



THE  
LAW AND CUSTOM OF  
THE CONSTITUTION

ANSON

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OF THE  
CONSTITUTION

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THE CROWN. PART I

FOURTH EDITION

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## PREFACE TO THE FOURTH EDITION

IN preparing a new edition of Sir William Anson's classical treatise I have, in the first place, been concerned to incorporate the changes due to the passage of twenty-eight eventful years, without adding materially to the extent of the work. This has necessitated compression of the original text and the omission of minor detail, but I have preserved all the essentials, including the historical treatment which the author so greatly valued. I have avoided substantial alterations in matters of opinion, and have made such changes only as seemed essential in view of information available since Anson wrote.

In the second place, I have dealt with certain matters which the author deliberately omitted, because he held that they had been adequately dealt with by Professor Dicey in his standard treatise. Much has happened in the twenty years since that work was last revised by its author, and of these developments it has been necessary to take due account. I have accordingly added a new Chapter (IV) dealing with the legislative powers delegated to the executive, and in Chapter XII I have included sections dealing with the judicial functions of the executive and the control of the executive by the Courts. Chapter V is now restricted to the title to the Crown, and in a new Chapter (VI) I have dealt with the relations between the Crown and the subject, incorporating in it Anson's sections on treason and nationality, the latter of which has necessarily been greatly extended in view of the far-reaching changes under the legislation of 1914–33. In Chapter VII the chief alterations concern Ireland, India, the Dominions, and Mandated Territories. I have stressed the distinction between Protected States and Protectorates of colonial type, as that has at last been recognized officially. The same remark applies to the typographical distinction of Dominions to denote the self-governing Dominions of the Statute of Westminster, and dominions to denote the territories of the Crown. In view of the importance of the subject, I have extended in Chapter XII the account of the position

## PREFACE TO THE FOURTH EDITION

of the Crown in litigation, with special regard to claims against the Crown and its privileges as a litigant.

The revision of the work was completed in May 1934, but an effort has been made to incorporate in the text while the proofs were passing through the press matters of importance.

Three further points may be added. As part of his function to secure the maintenance of peace and order, the Home Secretary has been charged with the duty of training the civil population for self-defence against air attacks; a Joint Committee of the Houses of Parliament has reported that by constitutional usage it would not be proper for Parliament to receive the petition from the Parliament of Western Australia, requesting the right of secession from the Commonwealth; and on June 6 the Privy Council affirmed in *Moore v. Att. Gen. and British Coal Corporation v. The King* the right of the Irish Free State to abolish appeal to the King in Council, and of Canada to abrogate appeal in criminal causes, thus establishing the wide effect of the Statute of Westminster adopted in this treatise.

As I have avoided the expression of my personal views on controversial issues, I may refer for such opinions to my *Letters on Imperial Relations, Indian Reform, Constitutional and International Law*, 1916–1935 (Oxford University Press).

A. BERRIEDALE KEITH.

THE UNIVERSITY OF EDINBURGH,

June 28, 1935.

## PREFACE TO THE FIRST EDITION

I REGRET that the second part of my work on the Constitution should have been so long in following its predecessor, and that it should not be better worth waiting for. For the delay I am not wholly in fault; for the shortcomings I can only plead a capacity unequal to the task which I undertook with a light heart, which I have pursued with interest and pleasure, and now conclude with misgiving.

I have tried to show how the executive government of this Empire is conducted,—to draw a picture of the executive as distinct from the legislature—of the Crown in Council as distinct from the Crown in Parliament.

Of the difficulties which I have experienced, two stand out prominently before me.

I think that any one will find it difficult to describe faithfully the daily working of a business with which he is not practically conversant. I have found it so in the course of my endeavour to describe the working of the departments of government. In spite of the kindest and most generous help from many friends who have the details at their command, I fear that I have not done justice to their efforts on my behalf.

But my greatest difficulty has been to arrange my subject. I wished to show how the business of government is carried on; who settles what is to be done; who acts; on what authority; and in what manner. In order to do this, and to do it within reasonable compass, I have omitted two matters, which I have found to occupy a place in other treatises. The royal prerogatives set forth at length by Blackstone are either attributes ascribed to royalty by lawyers, or are powers exercised through departments of government. As such I have dealt with them, and my chapter on the prerogative will be found to contain, apart from history, only an account of what the Crown actually does, at the present day, in the choice of ministers, the settlement of policy, and the business of administration.

Another matter with which I have not specially dealt is

the conflict which has from time to time arisen between the rights of the subject and the assertion of rights by the executive officer. It does but illustrate the working of that ‘rule of law’ which, as Mr. Dicey has impressed upon his readers, is a marked feature in our constitution. I have noted the exceptional position of persons subject to ecclesiastical or military law, and I have noted also the circumstances under which the Crown and its servants enjoy any special privileges or immunities in the administration of justice; but having once stated the principle that the King’s command cannot excuse a wrongful act, and the fact that the Crown has no longer the power to control the action of the Courts, I have not made these matters the subject of any special treatment or illustration. I could but have said over again, what Mr. Dicey has set forth once for all, that in the relations of the Crown and its servants to the subjects of the Queen the rules of Common Law prevail.

Omitting these topics, which I conceived to be either useless or irrelevant to my purpose, I had still to arrange, in their proper places, the parts which the Crown plays in the work of government; the composition and action of the Cabinet—the determining power in the constitution; the departments of government which carry out the policy accepted by the Crown, on the advice of the Cabinet; and the working of these departments over the vast area of the Queen’s dominions; finally I had to state the relations in which the Crown stands to the Churches, and to the Law Courts of the United Kingdom and the Empire.

Of the arrangement which I have adopted, I will only say that it represents an anxious effort to supply the student with the information which he requires, and to supply it in the place and order in which he might reasonably expect to find it.

As to the information itself, I have had to collect it from many sources. Of books dealing with the subject in its entirety, I have found the fullest and the most serviceable to be the work of Mr. Alpheus Todd ‘on Parliamentary Government in England’, but for the most part I have had to go to special treatises, to Parliamentary papers, or, directly, to the various government offices. For the kindness of members

of many of the departments of government, I find it hard to express my gratitude in terms satisfactory to myself. If I do not make more than this general acknowledgement now, it is because I am unwilling to associate their respected names with a work which may perhaps prove to be a failure. If my book should meet with such approval as to need another edition, it will be my pleasure as well as my duty to thank them individually.

It may be thought that the historical matter which I have found it necessary to introduce, occupies too large a space. I can only say that I found it impossible to explain the present without such reference to the past. Nor can I regret that this should be so. For when we contemplate our institutions in their monumental dignity, and the world-wide span of our Empire, it is well to remember the patience and courage of our forefathers, and the long line of kings and queens and statesmen, often conspicuously great in force of purpose and vigour of intellect, to whom we owe what we now possess. It would be a mean thing, even if it were possible, to take stock of our inheritance without asking how we came by it. But it is not possible. If it is difficult to dissociate law from history in any branch of legal study, least of all can this be done in describing the fabric and machinery of an ancient state. I will not therefore apologize either to lawyers or to historians for trespassing on the domain of history; I will only express a regret that I have not trespassed with greater knowledge and a surer foot.

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ALL SOULS COLLEGE,  
*January, 1892.*



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## INTRODUCTION

### *Modes of describing the Constitution*

THE writer who sets about the task of describing the Constitution of his country may follow more ways than one.

There are, at any rate, three distinct methods of treatment. He may take the characteristic principles which distinguish our Constitution from those of other States. He may show how historical antecedents and traits of national character lead us to approach constitutional problems from a point of view different to that of other nationalities. Treatment of this sort, setting forth deep-seated principles and illustrating their action from history and from the present time, is perhaps of more permanent value than any other mode of describing a given constitution. This is the method adopted by Professor Dicey in his work on the *Law of the Constitution*.

Another method is that followed by Mr. Bagehot in his *English Constitution*<sup>1</sup> and Sir S. Low in his *Governance of England*.<sup>2</sup> They do not describe in detail the structure or the relations of the various parts of our Constitution. They assume a knowledge of the general law and procedure of Parliament, of the nature of the Cabinet, of the departments of government. They draw vivid and lifelike pictures of a Constitution in being. Professor Dicey deals rather with the relations of the individual to the sovereign power of the State; his rights as to freedom of the person, freedom of speech, freedom of public meeting; his subjection to Parliament in the matter of legislation. Mr. Bagehot and Sir S. Low are not concerned with these matters. They show us how the machine works, what parts are played by the King, by the Cabinet, the Prime Minister, the two Houses of Parliament. The pictures, no doubt, are of the sort described as impressionist, but they live all the same.

There is a third method, that here adopted, which perhaps offers the most ungrateful task of the three. It is to describe these institutions with enough history to explain their

<sup>1</sup> Reprinted from the *Fortnightly Review* (London, 1867).

<sup>2</sup> First published in 1904, new ed., 1927.

## INTRODUCTION

existence, and enough of their working to show what they are intended to do. To do so involves entering into details, some of which are dry and wearisome to the reader. Often it is hard to observe a due proportion between the history of an institution and its present state. A full history of the Government departments has yet to be written, but those of our institutions which are less definite in character—the Cabinet, the Prime Minister—must be treated historically if they are to be treated at all; for the present, in these cases, is a dissolving view; the changes are constant, often almost imperceptible, but nevertheless very real.

This is what renders so attractive the pictures drawn for us by Mr. Bagehot and Sir S. Low; they represent the working of the Constitution at a given time, but only for a time. They tell us, what no dry record of institutions and their changes could tell us, how the thing which we call our Constitution lived and moved. They suggest many questions as to how the changes have come about which we see but cannot at once explain. The great framework of government is much the same as in 1867 and in 1904. Political power has been extended to an enormous electorate by Acts dealing with the representation of the people; constituencies have been rearranged by the Representation of the People Act of 1918; Local Government has been democratized. But, apart from Local Government, our institutions remain the same, and yet the balance of power has shifted. This is the way of constitutions written or unwritten, and our Constitution, so largely dependent upon conventions, so scantly expressed in written form, is peculiarly susceptible to such changes. Yet it is worth while to ask what they are and how they have come about, for this book deals with the Crown, the Councils of the Crown, and the ministers of the Crown, and necessarily with the relations of these to Parliament. Nineteenth- and twentieth-century legislation, though it has extended the possession and altered the distribution of political power as regards the choice of members to serve in the House of Commons, has never touched the relations of the King and his Cabinet to Parliament. Statute has embodied much of the Common Law prerogative of the Crown, and has for many purposes conferred necessary executive powers upon the King

and his ministers. But the altered relations of the Cabinet and the Commons which we may observe if we follow the political history of the last sixty years cannot be described as resulting from the deliberate action of the Legislature. If we note these changes and try to explain them, it may serve to warn us that, while the machinery of the Constitution may be described in the same terms at two periods fairly remote from one another, yet the working of the machine may be very different. There may be a change in the motive power, and the results may differ correspondingly.

Bagehot describes the Constitution as it was when Palmerston was Prime Minister. His book is an analysis of the motive powers of the Government of this country, none the less searching and profound because written in a familiar style. In a Preface to the second edition, which came out in 1872, he admits that much had changed in the previous seven years; that the disappearance of Palmerston, Derby, and Russell, the statesmen of the days before the first Reform Bill, made a marked difference in the atmosphere of politics, independent of any legislative change, and that the extension of the franchise in 1867 had altered, and would probably alter still further, the character of the electorate. But he reprinted his book as it was written, subject to reservations in the Preface; and, useful as it may be to compare the Bagehot of 1872 with the Bagehot of 1867, it is more important to compare these with the work of Sir S. Low writing in 1904.

### *The Supremacy of the House of Commons in 1865*

There can be no doubt that Bagehot, whether he was writing in 1872 or in 1867, regarded the House of Commons as the centre of political power and of political influence. By this we mean not merely that it was the strongest and most necessary part of the machine, but that it formed public opinion on great political subjects.

As one reads the book it becomes evident that this supremacy of the House of Commons is indicated by three features.

The electorate, before the changes of 1867, was what he describes as 'deferential'. The House of Commons chose the executive, and kept a constant supervision over the action

of ministers. Government was what he calls 'Government by discussion', and discussion conducted in the House.

(1) By a deferential electorate Bagehot means that the electors were prepared to believe that those who offered to represent them had better opportunities of knowledge, more experience, and more leisure than themselves; hence they chose men of means and social position in preference to others. To use his own words, he means: 'that the mass of ten-pound householders did not really form their own opinions, and did not exact of their representatives an obedience to those opinions; that they were, in fact, guided in their judgment by the better educated classes; that they preferred representatives from those classes, and gave those representatives much licence.'<sup>1</sup>

Whether this attitude of the electorate towards its representatives was likely to continue after 1867 he regards as open to question, and a body of critical and insistent electors must necessarily alter to some extent the character of the House of Commons, and affect the independence of the individual member. But this leaves untouched the other two features of the Constitution: the power possessed by the Commons to choose and control the ministers of the Crown, and the conduct of government by discussion, that is, discussion taking place in the House of Commons.

(2) The choosing and controlling power of the House of Commons is again and again insisted upon. 'The House of Commons is an electoral chamber; it is the assembly which chooses our President.' He compares it with the electoral college in the Constitution of the United States. The members of that college are sent there to vote for a particular candidate, and when they have voted their work is done: they have no further control over his action.

'But our House of Commons is a real choosing body; it elects the people it likes. And it dismisses whom it likes too. No matter that a few months since it was chosen to support Lord Aberdeen or Lord Palmerston; upon a sudden occasion it ousts the statesman to whom it first adhered, and selects an opposite statesman whom it at first rejected. *Doubtless in such cases there is a tacit*

<sup>1</sup> Bagehot, introduction to 2nd ed., p. x.

*reference to probable public opinion; but certainly also there is much free will in the judgment of the Commons.'*<sup>1</sup>

Later he speaks of the continuous control of the Commons arising from its power of dismissal. 'Its relations to the Premier are incessant. They guide him, and he leads them.' He contrasts the merits of the House and the whole body of the electorate as a choosing body ; a man chosen by the whole electorate 'is not the choice of the nation, he is the choice of the wire-pullers'.<sup>2</sup> Elsewhere he expresses apprehensions which sound strange to us as to the risk of 'the caprice of Parliament in the choice of a Ministry. A nation can hardly control it here ; and it is not good that except within wide limits it should control it'.<sup>3</sup>

(3) So much for the powers of the House of Commons in the selection and control of ministers. Now as to government by discussion. 'No State', he says, 'can be first rate which has not a Government by discussion.' It is 'a distinguishing feature of Parliamentary Government that in each stage of a public transaction there is a discussion'.<sup>4</sup> The House of Commons is 'a great and open Council of considerable men which cannot be placed in the middle of a society without altering it. It ought to alter that society for the better. It ought to teach the nation what it does not know'.<sup>5</sup> Elsewhere he speaks of the apparent anomaly of 'government by public meeting'. It is, he says, only rendered possible by party organization, and that again is only permanently efficient because the parties are not composed of warm partisans. But for this, he says, party government would be sectarian government, a government in which each party, when in power, endeavours to push its tenets to their logical results.<sup>6</sup>

Such, then, was the House of Commons in the Palmerstonian period in the eyes of a political critic at once acute and profound. A body of men treated with respectful deference by the electorate ; choosing, supervising, dismissing at pleasure, the ministers of the Crown : parties to discussions on which the fate of a Government may depend, and by which the mind of the country is informed on all matters of current political interest.

<sup>1</sup> Bagehot, p. 131.

<sup>2</sup> Ibid., p. 26.

<sup>3</sup> Ibid., p. 242.

<sup>4</sup> Ibid., 2nd ed., pp. lix and lxxi.

<sup>5</sup> Bagehot, p. 133.

<sup>6</sup> Ibid., pp. 142, 143.

No wonder that a seat in the House of Commons was an object of ambition. Bagehot tells us that he heard a man say, 'I wrote books for twenty years, and I was nobody; I got into Parliament, and before I had taken my seat I had become somebody.'

*The Decline of the Authority of the Commons*

In 1904 Low forms a very different estimate of the situation as regards the prestige attaching to a seat in the House of Commons. 'In these days', he says, 'one would be more likely to hear testimony of a very different character. "I sat in Parliament for twenty years. I voted steadily. I even made a speech occasionally. But outside my constituency nobody ever seemed to have heard of me. Then I wrote a flashy novel and some flippant essays, and I became a sort of celebrity at once."'<sup>1</sup>

If we ask how the change has come about—and though Low puts the matter hypothetically and incisively, it is impossible to deny the reality of the change—we may go back to the three characteristic features which mark Bagehot's estimate of the House of Commons, and ask if they are still in existence.

(1) First, the electorate, enormously extended by the Franchise Acts of 1884, 1918, and 1928, is no longer 'deferential'. A constituency does not send a man to Parliament because it is thought that he can form a better opinion on the topics of the day than the voters who sent him there. He is sent to vote for the minister, and for the measures, acceptable to the party organization by whose exertions he has been returned, and in many cases his political career depends on his obedience to the party whips. We have moved a long way from Bagehot's conception of Parliamentary government. The representative assembly has ceased, from his point of view, to be independent, because it is dominated by the constituencies, and, to use his own words, 'constituency government is the precise opposite of Parliamentary government. It is the government of immoderate persons far from the scene of action, instead of the government of moderate persons close to the scene of action.'<sup>2</sup> It is significant of the change that

<sup>1</sup> Low, *Governance of England*, p. 98.

<sup>2</sup> Bagehot, p. 146.

the reports of Parliamentary proceedings in the more popular Press are now in almost all cases negligible.

This may explain why the House has become less attractive to the average man of public spirit who is willing to give up a great deal of his leisure to the service of his country. Constituencies are exacting as to the vote and speech of their member in the House ; they are exacting also in their demands upon his attention when Parliament is not sitting. The choice and supervision of ministers which Bagehot assigns to the House of Commons may be said to have passed, as regards choice, to the constituencies, as regards supervision, to the Press.

(2) We come then naturally to the next point. The House is no longer 'an electoral chamber'. The capricious exercise of its powers of choice, as exemplified by the fall of Lord Palmerston's Government in 1857 and of Lord Russell's in 1866, would no longer be possible now. Low puts this very plainly :

'It is the constituencies which in fact decide on the combination of party leaders to whom they will, from time to time, delegate their authority.' 'The member of Parliament, sent to the House of Commons by his constituents, goes there under a pledge that he will cast his vote, under all normal conditions during the life of the Parliament, for the authorized leaders of his party.'<sup>1</sup>

In one respect the House retains a certain selective function. A man must show in debate that he has some powers of speech, some dexterity in the handling of a subject, some readiness of reply, in order to constitute himself a candidate for office. A Prime Minister, in filling the subordinate offices of Government, will probably choose men who have shown themselves acceptable to the House. These are cases in which neither the man nor the office occupies to an appreciable extent the attention of the electorate, and to this extent the House of Commons does exercise a real though not a dominating influence upon the choice of ministers.<sup>2</sup>

The active part played by the constituencies through the

<sup>1</sup> Low, pp. 101, 102.

<sup>2</sup> See a letter written by the late Lord Salisbury printed on p. 112 of the *Governance of England*.

party organizations in the selection of the leaders who are to be followed, and the policy to be pursued, naturally confers a great increase of power upon the Cabinet or Prime Minister. They and their policy represent the choice of the majority, for the moment, of the electorate, and the voters see to it that their representatives give effect to their choice.

(3) An indication of this increased power of the Cabinet is to be found in the virtual disappearance of the third of those features which Bagehot described as essential to our constitution—‘Government by discussion’. Successive codes of Procedure have placed the control of the time of the House more and more in the hands of the Government. There are, no doubt, good reasons why the Government should demand more time. The topics for legislation and discussion have increased with the extension of the King’s dominions, with the larger concern of the State in matters which were in time past left to the individual, with the development of industry and commerce, with international regulation of these topics, with social reform, and the growing importance of finance and currency issues. Discussion itself is prolonged. The councils of counties and boroughs now send up men who have played a part in local affairs, and who consider that the House should have the benefit of their wide knowledge and experience.<sup>1</sup> Obstruction, which came into existence in the year of Bagehot’s death, gives a valid reason for some control of debate, and the result of this combination of causes has had a marked and not very happy influence on the rights of members to discuss matters of public interest.

Firstly, the initiative in legislation and discussion which private members once enjoyed has been greatly reduced by rules of Procedure. A Bill introduced by a private member has little chance of passing unless the Government assist its passage ; if he introduce a resolution the discussion is little more than academical, and its result has no practical outcome ; a motion for the adjournment of the House may be met by a blocking resolution.

And again, not only does the Government appropriate the

<sup>1</sup> Mr. J. Chamberlain’s appointment to be President of the Local Government Board in 1886 marks the definite advent of a new element in English politics.

time of the House in large measure to its own business, but the way in which that time may be expended is also marked out. The various forms of bringing debate to a close, more especially the closure by compartments, or the guillotine, necessary as they may sometimes become if discussion is to be kept within reasonable limits, have at times this startling result, that large portions of an important and contentious measure may be passed without any discussion at all.<sup>1</sup> If they are to obtain consideration at all they must obtain it in the House of Lords, where debate is brief, businesslike, and unrestricted by the closure.

The tendency of every change of Procedure, for many years past, has been to impair the rights, restrict the independence, and so diminish the importance of the private member. But, excepting those who hold office, the House of Commons is made up of private members.

Parliament exists, as its name implies, for discussion: so, if the right of initiating discussion is limited in order to give time for Government measures, and if discussion on these is again limited practically at the pleasure of the Ministry, it seems plain that the power of the Cabinet has grown vitally at the expense of the House of Commons.

And thus, while the power of choosing ministers, which Bagehot regarded as the great function of the House of Commons, has passed in large measure to the electorate, government by discussion, which in Bagehot's view was essential if a constitution was to be first-rate in quality, has come, so far as the Commons are concerned, to be government by just so much discussion as the Cabinet pleases.

### *The Power of Dissolution*

The weapon by which the Prime Minister or the Cabinet enforces its will upon the Commons is the threat of a dissolution. The mere intimation that, if the necessary support is not given to a Government, its careless or lukewarm supporters may be sent to explain their conduct to their constituents

<sup>1</sup> So in the Committee stage of the Unemployment Bill many protests were made, as on 1 Feb. 1934. The responsibility is often shared by the Opposition which takes up the time allotted by discussing minor points, so as to be able to say that vital questions have never been discussed.

has been known to produce the desired results.<sup>1</sup> But why is it so effective? Why cannot the candidate plead his own merits, explain the causes of his conduct, and satisfy his constituents of his loyalty to the principles which he has professed?

Low supplies the reason, though, curiously enough, he describes it as a result, and not a cause of the power thus exercised by a minister:

'It follows also', he says, 'that one cannot, at any given moment, except in the few months immediately succeeding a general election, say that the House of Commons represents the opinion of even the majority of the electorate. It may have done so, roughly speaking, when it was chosen; but it may have lost that character long before it has seemed fit to the Premier to recommend a dissolution.'<sup>2</sup>

This is what makes the threat of a dissolution effective. Members know that under the present conditions of a general election the opinion of the country, as expressed by the result of the polls, can only be very roughly described as genuine, and is almost certainly short-lived. They know, therefore, that a dissolution means an election contest, with a certainty of expense and a probability of defeat.

The causes of this probability are to be found partly in law, partly in custom. The law is the Redistribution Act of 1885 and the Representation of the People Act, 1918; the custom is the modern development of party organization. The Redistribution Act based our representative system on the single-member constituency, and party organization has practically reduced the choice of the elector to two, or possibly three, candidates, no one of whom may be altogether satisfactory to him.

Every party worthy of the name, every party which professes great principles and is not limited in its efforts and interests to some one topic in the range of politics, embodies various elements: its members differ on various points within the range of those principles which are of the essence of the party creed. But as a single-member constituency, *ex vi termini*, can only elect one member, it follows that, if a num-

<sup>1</sup> Low, *Governance of England*, p. 110.

<sup>2</sup> Ibid., p. 112.

ber of persons compete for a privilege which can only be accorded to one, the choice of the constituency, as determined by a ballot in which each voter votes once for all for one candidate, may not express even the passing opinions of the majority of the electors.

If we can suppose such a constituency contested by six persons, two representatives of the Unionist party, who differ on Indian policy; two Liberals, one of whom supports and the other opposes the National Government; a Labour supporter and a representative of the Independent Labour party, the result would probably be a victory for the representative of that party whose internal divisions were least acute. There would almost certainly be some one of the candidates whom a large majority of the electors would have placed second if they had ranged the candidates in the order of their choice, or would, at any rate, have preferred to the person elected.

Organization, or 'the caucus', has come into existence to remove this difficulty, but the result remains unsatisfactory. Without organization the elector, confused by a wide range of choice, may vote for the man whom he would place first, and may find, not only that he is one of a minority, but that he has helped to ensure the defeat of the man whom he would have placed second if his views could have found full expression. With organization the elector may find his choice so narrowed that neither candidate is satisfactory to him, and he may abstain or even vote against his party. It is not every voter who has definite opinions or convictions on the issues, large or small, which divide the great parties in the State. There is a class of indifferent voter, greatly increased by the extension of the franchise, who is disposed to think that each party should have its turn, and there is yet another who likes to be on the winning side.

All these elements of uncertainty are present to the mind of the member who is threatened with a dissolution by the leaders of his party. He knows that the narrow choice afforded to the electors may have made him barely acceptable to many who voted for him on the occasion of his return. Party organization outside the House, and party discipline, controlling discussion inside the House, combine to make him feel that he cannot depend for re-election on individual merits

which he may have had little opportunity of displaying in debate. He may have displeased the party, or the party organizers; he will certainly do so if he votes against his leaders; his party may have become unpopular in the constituency; while he has been occupied in Parliament an opponent may have captivated the electors; and he knows that he runs the risk of being accused of faithlessness to his pre-election pledges.

If this were a place to discuss electoral statistics, it would not be difficult to show how great are the uncertainties, and how unrepresentative are the results of our present electoral system.<sup>1</sup> All these things are present to the mind of the member who at cost of money, time, and pains has won his seat, whose livelihood often depends on his possession of a seat, and who is therefore prepared to make some sacrifice of independence to avoid the risks of a general election. And this is why the Cabinet holds its followers in a firmer grip than was possible in days when single-member constituencies were rare, when members were not dependent on politics for a living, and the 'caucus' was unknown.

#### *General Results*

Thus have events altered the phenomena which underwent the searching diagnosis of Bagehot. The electors, not the Commons, choose the Government: the Government, not the Commons, determines the limits of discussion. Parliamentary discussion ceases to be interesting, even to those who take part in it, when its extent is thus controlled and its issues determined. The result of a Parliamentary debate is a vote on strict party lines, and the public regard with

<sup>1</sup> At the general election in 1886 a majority of votes was given for candidates who were in favour of Home Rule, but the Parliamentary result was a Unionist majority of 104. In 1895 the difference between the two great parties at the polls was not a quarter of a million votes out of four millions and three-quarters cast in favour of the Unionists, but the Parliamentary result was to change a Radical majority of 43 into a Unionist majority of 152. The results of the general election of 1906 gave the Liberals 379 members, reducing the Unionists from 369 to 157, a quite disproportionate result. In 1929 8,077,566 Labour votes won 288 seats, 8,013,167 Conservative votes 242 seats, but 5,042,964 Liberal votes only 57 seats. In 1931 the Government parties secured a seat for 29,000 votes, Labour one for 144,000, 13 ex-Cabinet ministers being rejected.

more interest the political discussion which is provided by the platform and the Press.

All these things invest the executive with an immense accession of power, a power which may be wielded by the Prime Minister alone if his influence controls the Cabinet or if his presence secures its cohesion: but, whether the form of government is a dictatorship or an oligarchy, the result is the same. The pressure which the Government of the day can now exercise upon the House of Commons may ensure the continuance of a Ministry in office until a Parliament expires by efflux of time. Since the Parliament Act, 1911, deprived the House of Lords of the power of rejecting Bills absolutely, the Government of the day tends to become as supreme in legislation, as it is in administration. The country, at a general election, puts its fortunes into the hands of an individual or a group of men who rule, subject only to the intervention of the prerogative, until the stated term at which the electorate again chooses its rulers.<sup>1</sup> The prerogative of the Crown might perhaps have to be brought into play to dismiss a Ministry in order to dissolve a House of Commons whose docility in support of the Government of the day arose from a knowledge that the House and the ministers alike had ceased to represent the wishes of the people, and that a dissolution would involve the retirement of many of its members into private life.

It is curious and not uninstructive to note how the leading traits of our Constitution, as drawn by Bagehot, have disappeared or are disappearing—the deference of the electorate, the moderation of parties, the choice of the Ministry by the Commons, their continued control and immediate power of change, the value of Parliamentary discussion in determining political results and informing the country. And yet the great framework of our institutions endures, and these changes have come upon us almost unnoticed. The lesson which the student may deduce is that he has only half learned, perhaps wholly misunderstood, the working of a constitution when he has mastered the Statutes and recognized text-books which set forth its legal outline.

<sup>1</sup> Under the Parliament Act, so long as the House exists, the life of Parliament cannot continue beyond five years without its consent.

*The Conventional Basis of the Constitution*

The possibility of revolutionary change without formal constitutional revision rests essentially on the fact that the whole system of responsible government is based on convention. It is thus practicable to adjust the operation of the Constitution to the changes brought about by the development of political conditions without legal change or serious difficulty. The advantages of the system are very great, and the Dominions have made but slight effort to enact responsible government as law. There is an exception in the case of the Irish Free State. Under its constitution there is enacted as law (1) the election of the Prime Minister, the President of the Council, by Dáil Eireann;<sup>1</sup> (2) the choice of his colleagues by the President, subject to the approval of his list by the Dáil;<sup>2</sup> (3) the rule of the collective responsibility of the Ministry;<sup>3</sup> (4) the principle that ministers must be members of the Dáil, or in one case of the Senate so long as that exists;<sup>4</sup> and (5) the duty of a Ministry to retire from office when it ceases to command the confidence of the Dáil.<sup>5</sup> In addition to these rules of law, which cause little practical trouble, the Constitution forbids the dissolution of the Dáil by the representative of the Crown on the advice of a Ministry which has lost the confidence of the Dáil.<sup>6</sup> The rule clearly offers disadvantages, and is hardly consistent with the final sovereignty of the electorate. That body is, according both to British and to Dominion practice, the power which determines the control of policy, and under the Irish rule a Ministry which represented the views of the electorate better than the majority in the Dáil might be precluded from putting to the people the determination of the issue. Thus in 1927, when a general election was urgently desirable in the State, it was almost prevented by the absence of a majority for the moment for the Ministry, and it was necessary to bring pressure to bear on a member to refrain from voting against the Ministry in order that it might possess the necessary authority to advise the requisite dissolution, which gave the Ministry

<sup>1</sup> Constitution, 1922, Art. 53. No power to dismiss is given to the Governor-General.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., Art. 54.

<sup>4</sup> Ibid., Art. 52.

<sup>5</sup> Ibid., Art. 53.

<sup>6</sup> Ibid., Arts. 29 and 53.

a renewed lease of power.<sup>1</sup> With this may be contrasted the position in the United Kingdom, where the Prime Minister in 1931 was able, thanks to the lack of constitutional rigidity, to reconstruct his Ministry, and to secure a dissolution despite the protests not merely of his discarded colleagues and followers, but of Mr. Lloyd George ; the results of the election approved his action, despite its unusual character.

It follows from the nature of conventions that they are not absolutely fixed, nor are they enforceable by legal means. In the long run the essential basis of conventions is the fact that they serve to support the sovereignty of the electorate, and they must be varied from time to time in order most effectively to subserve that end.

<sup>1</sup> Keith, *Journal of Comparative Legislation*, ix (1927), 250 f.

## CHAPTER I

### THE PREROGATIVE OF THE CROWN

#### I. THE NATURE OF PREROGATIVE

##### § 1. EXECUTIVE AND LEGISLATIVE SOVEREIGNTY

WHERE we find a body of persons independent in some degree of external control, united for the maintenance of that independence against force from without, and for the security of certain common interests, we may say that this is a political society or State. We may frame what ideal we please for such a society, mere security from invasion or anarchy, or the provision of the greatest measure of richness of life. But in every political society there must be some person or body to represent the State in its dealings with other States, to call forth and command the available force of the society, when needed, for defence or attack, and to frame and execute measures for the promotion of public welfare.

Again, in every such community rules of conduct must be made, and sometimes changed, with a view to internal security and order; and the observance of these rules must be enforced. If the fact of observance or breach should be called in question some recognized authority must exist for the purpose of answering the question, and here again the decisions of such an authority must be enforced. Thus we find that there are three sorts of machinery necessary to a political society: a legislature to make law, a judicature to interpret law, an executive to wield the force of the community for the maintenance of security without, and for the enforcement of law and order within.

The forces which work this machinery are found to be differently disposed in different communities and at different times. They may be centralized in one person or dispersed among many. To compare one polity with another, or to consider how constitutional forces may best be disposed, and to what end, is the business of the political student; we have here to deal only with the structure and working of our own constitution.

The law-making power in this country is primarily the

Crown in Parliament; Parliament, convened by the Crown and making laws with the royal assent, can change the constitution of the State and give or take away legal or political rights.<sup>1</sup> The interpretation of law is the work of the Crown in its Courts, done through judges who have been and are the councillors and representatives of the Crown. The enforcement of law within the community, the planning for its economic and social welfare, the maintenance of its safety and dignity as regards external relations, are also the duty of the Crown. The ministers of the King, collectively in the Cabinet, determine matters of policy; while this policy is carried into effect, and the everyday business of government is transacted, by the same ministers or their subordinates in the various departments which carry out the work of the executive. Our object is to describe the construction and practical working of these various departments or institutions, and to show how they are connected with the central executive force. But that force itself, the Crown, whence justice and administration alike proceed, stands at the threshold of our inquiry.

## § 2. THE PREROGATIVE

Some of the powers exercised by the Crown are conferred or defined by statute, but some also exist in virtue of custom or Common Law. The term 'Prerogative' may be applied to the whole of these, but it should properly be limited to the ancient customary powers of the Crown. We will deal at once with the meaning of a term which has caused some difficulty in the past.

Blackstone<sup>2</sup> defines prerogative as 'a special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the Common Law in right of his royal dignity'.

Professor Dicey<sup>3</sup> defines prerogative more precisely as 'the discretionary authority of the executive', and he explains this to mean everything which the King or his servants can do without the authority of an Act of Parliament.

<sup>1</sup> A vital feature of the present working of the Constitution is the delegated legislative power of the executive; ch. iv, *post*.

<sup>2</sup> 1 Com., 14th ed., 239.

<sup>3</sup> *Law of the Constitution*, p. 420.

Blackstone's definition of prerogative is obviously too vague to be of practical value. The powers of the Crown in its executive character are twofold, consisting in those which it possesses at Common Law and those which are conferred on it by statute. The Common Law powers are not, as Blackstone says, 'out of the ordinary course of the Common Law'; they are a part of the Common Law, and as capable of ascertainment and definition by the Courts as any other part of the unwritten law of the land. These Common Law powers make up what Dicey calls 'the discretionary authority of the executive'. The statutory powers cannot strictly be classed under the head of prerogative. They may be creations of statute or definitions or modifications of powers previously existing at Common Law: but they markedly differ from those powers the nature of which is only ascertainable by precedent, and the exercise of which is limited by discretion. And, besides these, there are certain attributes of the Crown from which legal results necessarily flow, and certain incidental rights, not perhaps of the first importance, yet proper to be treated of in a book on constitutional law. The Common Law powers of the executive do not therefore exhaust the meaning of this complex and difficult term.

One may with some approach to truth logically<sup>1</sup> ascribe the various rights, privileges, and attributes which make up the prerogative to three sources.

First, there is the residue of that executive power which the King in the early stages of our history possessed in all the departments of government; when he led his people in war, administered their affairs in peace, was their judge in the last resort. This power, vastly extended by the Norman Conquest, later reduced in compass by statute and limited in exercise by many conventional and practical restrictions, remains as that discretionary authority of the executive spoken of by Dicey.

Secondly, there are parts of the prerogative which trace their origin from the position of the King as the feudal chief of the country, as the ultimate landowner and the lord of

<sup>1</sup> Historically, on the other hand, the prerogative may be regarded as the sum total of the rights ascribed to the King as feudal lord paramount over all the lands of the realm.

every man. Hence arise those rights of the Crown which are in relation to the kingdom what a seigniory is in relation to a manor, the right to escheat, to treasure trove, to the custody of idiots and lunatics—these are topics which should fall, some under the head of revenue, some under that of jurisdiction. Hence too comes the early conception of treason as a breach of the feudal tie which binds the man to his lord. We now regard treason as an offence not so much against the person of the King as against the constitution of the State which he represents; and allegiance as a test of nationality rather than an assurance of loyalty to an individual; but these ideas begin in feudal times, and spring from the feudal relation in which the subject stood to the sovereign, and with the evolution of the autonomy of the Dominions allegiance as a personal relation has become a vital factor of unity.

Thirdly, there are attributes with which the Crown has been invested by legal theory. These attributes, which take their origin in notions of practical convenience, in their turn harden into legal rules which give rise to deductions sometimes of an unexpected and inconvenient character. Such is the attribute of *perpetuity*. It was important that one king should succeed to another with the shortest possible interregnum; that the King's peace should not be in abeyance for however short a time. As hereditary right came to be more strictly regarded, the process of election which intervened between the death of one king and the completed title of another grew less and less important. At length Edward IV was held to have begun his reign so soon as his title by descent was proved, and thenceforward perpetuity is regarded as a royal attribute; the King, it is said, never dies, and the throne is never vacant. The legal theory, though based on practical convenience, was found to be extremely inconvenient when James II fled the country, and it became necessary in the interests of good government to declare that, in spite of legal theory, the throne was vacant. The object is now attained by different means. Provision is made by statute for continuity in the administration of justice and the course of executive government, independently of the demise of the Crown.

Such, too, is the attribute of *perfection of judgment*. 'The

king', says Blackstone, 'is not only incapable of *doing* wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness.' Hence the King's ministers are held to be responsible for the acts of the King. There was much practical convenience in this theory of ministerial responsibility: misgovernment is more easily visited upon the officer who advises than upon the King who acts or authorizes action upon his advice. The servant can suffer without any such convulsion of the body politic as would ensue if the master were held liable. The doctrine took its rise when Henry III reigned though still a child, and it has been worked out on its political side in such a manner as to contribute alike to the stability of the throne and the popular character of our government. But the maxim in which it is expressed, 'the King can do no wrong', has lent itself to some deductions which not only limit the freedom of royal action, but also affect rules of private law. Coke tells us that there are things which the King may not do in person because if he were in the wrong the party aggrieved would have no remedy.<sup>1</sup> And there are injuries for which the subject can obtain no redress from the Crown, or, what is the same thing, from a department of government, because a master is only liable for the acts of his servants on the principle that their wrongdoing is his wrongdoing; so if the master 'can do no wrong', he cannot be made liable for the wrongful acts of the persons in his employment.<sup>2</sup>

Of these three aspects of prerogative<sup>3</sup> the most ancient and by far the most important are the customary rights which the Crown possesses, in relation to Parliament, to the executive, and to the Courts. The feudal rights of the Crown are mere incidents of the prerogative; they add, here and there, features which can only be explained when we conceive of the King as being in relation to the kingdom what the lord was to the manor. The artificial rules deduced by lawyers from attributes ascribed to the sovereign have doubtless important

<sup>1</sup> 2 Co. Inst. 186.

<sup>2</sup> See ch. xii.

<sup>3</sup> Occasionally, but not in legal terminology, the term is narrowed to cover only the sphere in which the Crown has a *personal* discretion of action—whether under Common Law or statute (as in Lee, *King Edward VII*, ii. 38–44), but this is decidedly inconvenient, and rests on some misunderstanding of Dicey's intention.

effects traceable in the working and conventions of the Constitution: but these are merely attributes associated with a certain conception of monarchy, and are not fundamentally concerned with the government of the country. The powers of the Crown, legislative, executive, and judicial, are what concern us here. Those of the Crown in relation to Parliament have been already dealt with; it remains here to treat of the Crown as acting for the State through the various departments of government, or in its judicial capacity through the Courts.

The legal powers of the Crown seem wide in theory and limited in practice: the influence of the Crown is something not easy to define either in theory or in practice: to trace the process by which this power and influence have come into existence and have varied in extent from time to time would be to write the history of the monarchy in this country, a task which cannot here be attempted. Yet it may be useful to mark in outline the periods of growth and limitation of the royal power, because the present law and custom upon the subject have been slowly defined, and their definition must be illustrated by precedents which it is not easy to understand without some general knowledge of our history.

## II. THE KING BEFORE PARLIAMENTS

### § 1. THE SAXON KING

The Saxon king was a representative chief. To the members of his community he was the embodiment of its dignity and its history. For this purpose the kingly office was endowed with special sources of revenue from the land of the community and was adorned with the insignia of royalty, the throne, the crown, the sceptre, standard, and lance. The King represented the order and the justice of the community since he was bound to preserve its peace and, in the last resort, to declare its customs upon appeal. He represented the force of the community in its dealings with other kingdoms, in the conduct of war, in the making of peace and of treaties. The sheriffs, the bishops, the ealdormen, that is to say, the great local officers, secular and spiritual, were his officers. In conjunction with the Witan he regulated foreign relations and

church affairs; he made laws and imposed taxes, but the laws were his laws, and he appropriated to such purposes as he thought fit the money raised by taxation.

The Saxon king had therefore a position of great dignity and a wide discretionary power: but in the exercise of this discretion he was constantly checked by the necessity<sup>1</sup> of acting with and through the Witan, and was ultimately controlled by his responsibility to the community whose collective wisdom the Witan was supposed to represent.

The Witan in historical times consisted of officials, of ealdormen and bishops, of king's thegns and nominees of the King: it can only therefore by a figure of speech be said to have represented either the wisdom or the general opinion of the community.<sup>2</sup> But in its relation to the King the Witan was a powerful body. It took part with him in legislation and taxation, in the deliberations which determined the policy of the country, in the jurisdiction exercised over disputes between the aristocracy, in the grant of public land, in the appointment of ealdormen and bishops.<sup>3</sup> And further, though royalty in theory came to be confined to one family, the Witan in the assembly of the nation made choice of the most fitting member of that family to be king. The King went through the formal process of election, his responsibilities were formulated in the Coronation oath, and were enforced by the possibility of his deposition.<sup>4</sup>

The Saxon king, then, though his dignity was great and his discretionary power wide, was not a hereditary monarch, as we understand the term hereditary, was not supreme land-owner, was not irresponsible for acts done by his command.

## § 2. THE NORMAN KING, HIS MINISTERS AND COUNCIL

The position of the Norman King was very different from that of the Saxon, and this was partly the necessary result of a position acquired by conquest, partly the consequence of

<sup>1</sup> Stubbs, *Const. Hist.* i. 127, 194, 276, 370 (§§ 53, 76, 98, 125).

<sup>2</sup> There are a few traces of an older assembly of democratic character; Liebermann, *The National Assembly in the Anglo-Saxon Period*, pp. 2-6.

<sup>3</sup> Liebermann, *op. cit.*, pp. 59-75.

<sup>4</sup> *Ibid.*, pp. 55-9. Cf. Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 355-66.

feudal ideas derived from the Continent,<sup>1</sup> though there were already in operation in England influences tending to produce this system. Anxious as William I undoubtedly was to avoid the appearance of an adventurer and to figure as the rightful heir to the inheritance of Edward the Confessor, his title was established and upheld by force and arms. When resistance was overcome, the institutions of the land were at his mercy, and he used them as seemed to him most prudent for the security of his throne.

Feudalism, which was based on the holding of land subject to certain obligations of fealty and service, made the King the supreme landowner, reduced all other holders to tenants, and invested the relation of King and subject with a contractual character, a right on the one side to service, on the other to protection. This position of the King in relation to land had various effects. In respect of the great landowners who held of the King it established a personal tie between him and them which tended to strengthen his hold upon their fidelity and service, and suggested the doctrine that important public duties were really private obligations, created by a business contract; in respect of the royal revenue it made the King the immediate owner of all the unappropriated land of the community and the inheritor of every tenant-in-chief who died without heirs or forfeited his land for misconduct;<sup>2</sup> in respect of title to the Crown the close association of the rights of the Crown with the ownership of land tended to assimilate the descent of the Crown to the descent of an estate in land, and thus inevitably increased the hereditary at the expense of the elective character of kingship.

But William was not content that the feudal relation should exist only between himself and the tenants-in-chief. He re-established the rule that every man, of whomsoever he might hold his land, should reserve his fealty<sup>3</sup> to the King, and should owe the King whatever military service was due upon

<sup>1</sup> To this one may add that the Norman duke was practically absolute, though he acted in the presence of a Council of Barons chosen by himself; C. H. Haskins, *Norman Institutions* (1918). See Adams, *P.H.E.* ii. 14-23, for manorial and political feudalism.

<sup>2</sup> 'Ultimi heredes aliquorum sunt eorum domini,' Glanvill, vii, c. 17.

<sup>3</sup> Glanvill, ix, c. 1; Littleton, ii, c. 1. Edmund (c. 943) had exacted an oath of like character; Stubbs, *Sel. Char.*, p. 77. Cf. Adams, *P.H.E.* ii. 68, 69.

his fief. Thus there existed a direct relation between the King and every landowner in the kingdom, a relation far more precise than had existed when the King was regarded by the community as its representative merely. The King did not lose his representative character ; but the Coronation oath on the one side, the undertaking to be faithful on the other, made up the terms of a contract in which the fidelity of the subject was the consideration for a promise of good government by the King.

With these changes in the relation of King and subject came greater definition in the character of the consultative body through and with whom the King professed to act. The Witan represented, by a figure of speech, the wisdom of the community. The *Commune* or *Magnum Concilium* of the Norman kings<sup>1</sup> was in theory, and, on state occasions, in practice, an assemblage of the feudal tenants-in-chief, the greater clergy and royal officers. But much of the King's business was carried on with a limited circle of magnates and officers. The time came, as we shall see in the Great Charter, when the larger assemblage of tenants-in-chief became an important check upon the Crown ; but this was not yet.

There came too, with the Conquest, a great change in the administrative system. In the ill-compacted monarchy of the Saxons each shire was a complete administrative unit very slightly connected with the central government. When the duties of administration became too heavy for the King to discharge them in person, no attempt was made to classify and divide those duties, to assign them to departments and create a staff to discharge them. The Saxon kingdom was divided into ealdormanries,<sup>2</sup> and thus the tendency to disunion, inherent in the Saxon polity, was increased. The great offices of the household were merely decorative. The High Reeve of Ethelred, the supposed counterpart of the later Justiciar, is a shadowy and uncertain figure.<sup>3</sup> The Chancellor of Edward the Confessor indicates, we may be sure, a liking

<sup>1</sup> Baldwin, *The King's Council* (1913), ch. i; Liebermann, *The National Assembly*, pp. 75-90. It is disputed how far the bishops' presence was deemed to be based on tenure.

<sup>2</sup> Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 161-97.

<sup>3</sup> *Ibid.*, pp. 231, 232, 237.

for foreign customs, rather than a move in the direction of administrative reform.

But under the system initiated by the Conqueror, and more fully developed by Henry I, justice and finance were dealt with as two departments of government, manned by a staff of officials and superintended by the great household officers and by the ministers who now begin to assume definite functions—the Justiciar, the Chancellor, the Treasurer.

When the King was abroad or absent from Curia or Exchequer he was represented by the Justiciar, *primus post regem in regno*; indeed the very existence of the office was largely due to the frequent absence of the King upon the Continent. Moreover, the Norman king dared not entrust large powers to local magistrates. Where he had to delegate plenary executive powers, he delegated them to a representative of himself for the whole kingdom: the very magnitude of the office made its holder a minister acting for the King, not a local potentate setting up independent local powers.

But the need to specialize duties became apparent as administrative requirements widened. A strong judicial staff was needed to enforce the King's justice, and to make his Courts more attractive to the suitor than those of the local or seigniorial jurisdiction. A strong financial staff was needed to secure that good administration should be accompanied by a solvent Exchequer, independent of the feudal liabilities of the tenants-in-chief. The two were so intimately combined—the profits and costs of asserting and administering justice and the incomings and outgoings of the Exchequer—that the same men acted in a twofold capacity. The justices of the Curia sat as barons of the Exchequer. The Chancellor was great alike in Curia and Exchequer. The Treasurer's duties and anxieties were so engrossing as 'hardly to be set forth in words'.<sup>1</sup> Thus the Curia and the Exchequer consisted of the same officers discharging different functions as *justitiarii* or *barones*. Moreover, both bodies could perform advisory functions; there was no essential distinction between them and Council.

<sup>1</sup> *Dialogus de Scaccario*, i. 6. For the early importance and general character of the Exchequer, see Baldwin, *The King's Council*, pp. 210–12. The name denotes the chequered cloth which covered the table at which the accounts were taken between Treasurer and sheriff, then the room itself, and finally the institution developed from the sessions of the Council.

In two ways these institutions are of permanent interest. The administration of Curia and Exchequer knit together local and central government. The justices of the Curia, itinerant throughout the land, declared and enforced the King's law, assessed and levied the King's taxes ; the sheriffs, who remained, as of old, the presiding officers of the Court of the shire, appeared twice in each year at the Exchequer to render account to the barons of the sums due from the shires.

And again, we can trace the beginning of the distinction between the executive and judicial part of our institutions and the legislative or deliberative, when we find a great Council meeting for general legislative and political as well as for judicial business, while the permanent administrative and judicial staff is in constant session at the Curia and the Exchequer.

For our present purposes the Curia is an institution of greater interest than the Commune Concilium. The Commune Concilium, even in its most developed form, as set forth in Magna Carta, is only the feudal conception of a law-making and taxing body ; it is not so much the parent as the feudal counterpart of the assembly, representative of shire and town, which was called into being by Simon de Montfort, which was organized and perpetuated by Edward I, which, renovated and adapted to modern conditions by the legislation of the nineteenth and twentieth centuries, exists as the Parliament of to-day. But the Curia, the administrative centre, is the germ from which have developed the departments of government. Whether we regard it collectively as a Council of the Crown, or whether we regard it as a group of officials—the holders of the new political offices created by the Norman kings—we can trace from it our executive of to-day. From the Curia also derives the royal judicial system which is to create a Common Law out of a chaos of local customs.

Thus we may say that the Norman monarchy, though practically absolute, nevertheless maintained the form of counsel and consent, enlarged the area from which the Common Council of the realm should be drawn, and gave a definite qualification, that of tenure, to the main body of its members ; above all it created a strong central administration dis-

tinguishable from the larger Council, and drawing together by its vigorous action the local institutions of the country.

### § 3. THE ANGEVIN KINGS

We have not yet reached prerogative in the modern meaning of the term, because prerogative is the result of a definition more or less complete of royal privilege and power, and the age of definition has not yet come. The ill-organized Saxon community put itself into the hands of a king and a body of non-representative advisers for all but local purposes. The Norman king tightened his hold on the community: he used the personal relation of feudalism, the moral bond of society in the Middle Ages, to bind every landowning man to himself; he used the territorial bond of feudalism to make him the ultimate lord of every man and the immediate lord of the great men of the kingdom; but he restrained the tendency of feudalism to break up a kingdom into independent lordships; and he did this by means of the vigorous administration which checked the growth of local jurisdictions and brought the central power into close touch with local institutions throughout the country. And yet we can see that the community possessed the rudiments of a control on the use of royal power. The Commune Concilium does represent the feudal society, and it is a machine regularly constituted, though not in regular working, for purposes of legislation and taxation, criticism and control.

And, though it is true to say that until Parliament comes into existence we have not the means of defining, or even approximating to a definition of, prerogative, as we understand the term, yet between the accession of Henry II and the Parliament of 1295 we can trace continuous progress, first in the development and the definition of executive functions—in less abstract terms, the growth of departments of government; and next in the control or supervision of the exercise of these functions by a body more or less representative of the community. Three points in the history of the executive stand out prominently in this period of our history. The first is the increase of departmental activity in the reign of Henry II; the second is the definition of royal power and the rights of freeholders in Magna Carta; the third is the dawn

of the conception of a responsible executive traceable during the minority and through the reign of Henry III.

(1) Henry II found a nation wearied out with the miseries of anarchy, and the nation found in Henry II a king with a passion for administration. Henry was determined to make his law prevail throughout the land; hence his attempt to define the jurisdiction of the ecclesiastical courts in the Constitution of Clarendon (1164); his insistence in the Assize of Clarendon (1166) that no franchise or local jurisdiction should exclude his sheriff from entering therein; his requirement that his writ should initiate every suit relating to the freehold. All this needed a development of the judicial system, and we find this effected in two ways, from above, and from below.

The royal administration of justice was strengthened and elaborated by the system of itinerant justices constantly modified throughout the reign, and surviving to the present day in the modern system of circuits; and further by the severance from the general work of the Curia of a body of judges who were to form a permanent court *in banco*, to hear all complaints, and to reserve cases of special difficulty to be heard by the King in Council.

But the royal administration of justice was further strengthened by its connexion with local machinery, the twelve lawful men of the hundred and four of the township who presented criminals to the King's justices, and the jury of sworn recognitors, selected by the sheriff or otherwise, who determined questions of fact as to the right to the freehold. Everything was done to make the King's Courts and the royal justice more attractive to the suitor and to enlarge their jurisdiction and increase their business at the expense of the local or communal, and the seigniorial or feudal, courts. The same system prevailed in finance. New forms of taxation needed a better-organized system for assessment and collection. Such a system was worked out by a further development of official machinery, and the employment of a local jury to determine local liabilities, bringing local and central administration into yet closer connexion. In the use of a representative jury to settle the liabilities of the locality to the central government we may see the beginnings of the representation of the Commons for the grant of supplies to the Crown.

The growth of the official staff indicates the increase of departmental business, and the details of administration pass beyond the immediate control of the King, even of a king so busy and so acute as was Henry II.

(2) Next in order of time comes Magna Carta. The promises of the Coronation oath were vague and general: the terms of the Charter are precise. Many things have been read into the Charter of which its framers never dreamed, trial by jury in its modern sense, consent to taxation, *habeas corpus*, even Parliament itself. Provisions which dealt with immediate grievances, or were limited by the conditions of the time, came to be expanded in interpretation until they embodied those principles of constitutional freedom which were at issue in the seventeenth century. But after making all due allowance for the exaggeration of political enthusiasts the Charter stands out as a formulated definition of liberties to which every freeholder could refer for proof of his right to freedom from arbitrary taxation and arbitrary punishment.

(3) Lastly, we find in the reign of Henry III the beginning of our modern ideas as to the relation of King to ministers, of ministers to the Common Council of the realm.

Tedious and inconclusive as are the struggles and bickerings which make up the history of this reign, its constitutional results are of great importance, quite apart from the development of the representative system by Simon de Montfort.

Out of the Curia of the earlier period proceed on the one hand specific departments of government and administration, on the other a body of councillors through whom and with whose advice the King acts in matters of state. The Chancery, the Exchequer, the Common Law Courts separate, more or less clearly, from one another. The Exchequer has its own Chancellor to aid and check the Treasurer. The Courts acquire different jurisdictions administered by different bodies of judges. The Chancellor affixes the great seal to formal manifestations of the royal will, while the secretarial portion of his duties passes into the hands of the King's secretary, an official who from humble beginnings is to develop ultimately into the Secretary of State.

As the departments of government begin to assume definite shapes, the circle of royal advisers with whom questions of

general policy are discussed and determined acquires a distinct character.<sup>1</sup> The infancy of Henry III accentuated this development and his inability to rule wisely led to the history of his reign being largely concerned with efforts to control his choice of counsellors. An interesting development is the insistence on a sworn body from time to time. From this period some modern principles take their rise. The responsibility of ministers for the acts of the King dates from the time when the child Henry was the nominal head of executive government.<sup>2</sup> With the responsibility of ministers comes the rule that 'the King can do no wrong'.

Then again there arose with the conception of a responsible ministry a desire on the part of the larger assembly, the Great or Common Council of the realm, to control the choice and the action of the King's ministers. This Council had chosen the regent and those who were to act with him on the death of John, and it would seem that the baronage were not willing to forgo the position which they then assumed. Of this the Provisions of Oxford (1258) bear evidence;<sup>3</sup> they provide the King with a Council of fifteen, supervised by a Committee of twelve elected by the community. It is true that this claim was made by the barons on behalf of their order, and not for the Common Council as representing the whole nation; but concessions thus made and rights thus acknowledged could readily be adapted to the larger and more representative body which shortly came into existence and reasserted on its behalf.

### III. PARLIAMENT AND PREROGATIVE

#### § 1. LIMITATIONS ON ROYAL ACTION

It may be said that the definition of prerogative begins with the existence of Parliament. In spite of the negligence or the errors of the later Angevin kings the tendency of political life was towards the growth of royal power. The feudal king was no mere official representative of the community. Even the Saxon king had been more than this: the dignity of a long pedigree and the sentiment of the *comitatus*

<sup>1</sup> Baldwin, *The King's Council*, ch. ii.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 41 (§ 171).

<sup>3</sup> Ibid. ii. 76–8 (§ 176); Baldwin, *op. cit.*, pp. 30–2.

combined to invest his position with a reverence which does not attach to an elected chairman or president.

Feudalism enhanced the power and the position of the Crown by introducing something more both of moral and legal force into the relation of King and subject. The sentiment of fidelity due from the vassal to his lord strengthened the loyalty due to the King. And since it was the tendency of feudalism to connect jurisdiction with land, to bind the feudal tenant to suit and service in the lord's court, the King's title to inherit the Crown lands, to hold them, to demand the services due to him, to be supreme landlord, and, as keeper of the peace of the community, its supreme judge, came to be regarded as a proprietary right. But this right was of exactly the same character in its relation to the tenants-in-chief as their rights were in relation to the vassals, and so the interests of the feudal society were to some extent enlisted in the maintenance of the rights of the Crown.

To the strength given by feudalism to royalty we must add the sanctity attached to the kingly office by the ceremonial of coronation and the voice of the Church. The King was not merely the chosen of the people, he was the anointed of God. Besides all this, the King, if he was a capable man, was the strongest man in his dominions; he had the machinery of administration at his disposal, and could probably at any given time command more money, and put more men into the field, than any one of his barons.

True there was no doctrine that the King was above the law. That would have contradicted the contractual basis of the feudal bond. The promises of the Coronation oath and the definitions of the Great Charter were evidence of the duty of the King to govern according to law and to observe those limitations on royal power which the Charter prescribed. The rights of the King as law-maker, judge, and administrator were also limited by the customary rule that he must act through and with his Council. On the other hand, these rights had come to be regarded as inherent, not delegated: just as the hereditary character of the title to the Crown grew at the expense of the elective. And, while the conception of the kingly office tended to grow in majesty and force, the Council varied greatly in efficiency as a restraining power: sometimes

its composition was settled by a powerful baronage designedly as a check upon the King; sometimes a strong king would form a Council of royal nominees, new men on their promotion, who were merely exponents of the royal will.

Something more than this was needed to enforce the supremacy of law and theoretical limitations on the power of the Crown, and to make the King the true representative of the national will. The Commune Concilium, as contemplated in c. 14 of the Charter, was not a representative assembly; practically it consisted of the tenants-in-chief; it was not summoned for general purposes of counsel and consent; the King only undertook to summon it in the case of a special demand for aid or scutage made upon the feudal tenants; it had no control over the action of the executive unless such a demand was made and terms could be obtained for compliance. Where this assembly was in a position to make terms with the King its interests were not bound up with those of the community as a whole, they were the interests of the class of landowners who held directly of the Crown. And at best the Concilium of the Charter was merely an expansion of the Council with which the King habitually acted, an executive and deliberative body temporarily enlarged for a special object, which was wholly unfitted to enforce obedience to the Charter by the Crown.

To define the prerogative of the Crown a force was needed which should be distinct from the executive, embodied in an assembly which should represent the community in its entirety, and possessed of means for ultimately putting constraint on the royal will.

Such a force was found in Parliament as constituted by Edward I, however little he planned such a result: an assembly representative of the clergy, baronage, and commons, the three estates of the realm; and the constraining power which it possessed was the power of the purse. The King's revenue was insufficient to meet the needs of the State; the necessary supplement to this income could only be obtained by the goodwill of the community; and the community of the thirteenth century might be regarded as fairly represented in the Model Parliament of 1295.

Parliament was not slow in asserting its powers. In the

right to tax, to make laws, to choose the ministers of the King it claimed to have a concurrent if not a dominating voice.

Time was needed to show the insufficiency of a bare insistence on these rights. It was not enough to be a necessary party to taxation unless Parliament could determine the nature of the expenditure to be incurred, and could ensure that the money granted was spent on the purpose for which it was voted. It was not enough to be a necessary party to legislation, unless the Crown was unable to suspend its operation or dispense with its limitations, and the Courts by whom laws were interpreted were free from the influence of the Crown. It was not enough to appoint the King's ministers unless Parliament could exercise some control over their action.

The appropriation of supply and the audit of accounts, the independence of the judges, and the whole theory of ministerial responsibility, are constitutional questions which evolved themselves and were settled after centuries of political strife or discussion. They were very dimly realized, if at all, by the Parliaments of the thirteenth and fourteenth centuries. The right to tax and the right to legislate form part of the history of Parliament. But the insistence on the right of Parliament in these respects was effective, if indeed it was not essential, for the limitation of the discretionary power of the Crown in the choice of ministers, in the determination of general policy, in control over the details of administration. The first struggles begin over the choice of ministers. This becomes more important to the King as the sphere of administration becomes wider and its details more complex.

The claim made by the barons in the reign of Henry III, and by the magnates in the reign of Edward II, to have a voice in the nomination of the King's ministers and to control their action, was revived by Parliament in and after 1376, when the old age and failing powers of Edward III and the minority of Richard II had given increased importance to the executive powers of the Council. The Commons desired to control these executive powers by securing the nomination and election in Parliament of the Chancellor and the Lord Privy Seal, through whom chiefly the royal will was expressed; of the Treasurer, who was responsible for the public income and expenditure; of the Chamberlain, whose official duties were varied and

important; and of the Steward of the Household, who was responsible for the economy of the Court and the maintenance of the royal state. They aimed at a Council of lords and bishops, independent of royal favour. Richard, for his part, strove for a body of his officials, and in practice both elements figured in the Council.

Moreover, by requiring an audit of accounts the Commons endeavoured to enforce ministerial responsibility and the right use of public money. By the process of Impeachment<sup>1</sup> they dealt with such political offences as were outside the ordinary course of law.

But very early in its existence the House of Commons seems to have become aware that for the control of the Crown in administration it was of supreme importance to secure the independence of the Courts and the publicity of judicial procedure.

The King might delay a cause or withdraw it from the Courts by writs issued under his lesser or privy seal,<sup>2</sup> or he might grant charters of pardon so wide in their terms as to amount to a dispensation to commit crime. These were the earliest grievances, and they were dealt with by Statute.<sup>3</sup>

Or a man might be summoned by writ of subpoena before the Council, where the King continued to preside after he had ceased to sit in the King's Bench. The powers of the Council were undefined and arbitrary, and its procedure differed in many respects from that of the Common Law Courts. It was in vain that the Commons sought to destroy this jurisdiction or to control its exercise.<sup>4</sup> It developed in

<sup>1</sup> See vol. i: *Parliament*, pp. 384-8.

<sup>2</sup> 28 Ed. I, c. 6. No writ concerning the Common Law was to go out under the little seal.

<sup>2</sup> Ed. III, c. 8. Neither great nor little seal should be used to delay common right; if so used the justices should pay no attention to such commandments.

<sup>3</sup> 2 Ed. III, c. 2; 10 Ed. III, st. 1, c. 2; 14 Ed. III, c. 15; 13 Ric. II, st. 2, c.1.

<sup>4</sup> Statutes on this subject are numerous. They begin with generalities.

<sup>5</sup> Ed. III, c. 9. None shall be attached or forejudged contrary to the Great Charter or the law.

28 Ed. III, c. 3. None to be put out of his lands or imprisoned, disinherited, or put to death but by due process of law.

Then they become more explicit.

42 Ed. III, c.3. No man to be made to answer before the King's Council

spite of the Statutes and the protests of the fourteenth and fifteenth centuries until opposition died away, to return with conclusive effect in the legislation of 1641. The reason was simple: the Common Law was ill adapted to deal with great offenders and order could better be secured by allowing the Council to act.

But the instinct of the Commons was a true one. The prerogative must be limited by law if it was not to be limited by force, and legal restraints were of no avail if the king could constitute or control the Courts which interpreted the law.

## § 2. THE LANCASTRIANS

The growth of the collective powers of the Council is, constitutionally, not less important than the growth of individual departments of government. In the reign of Richard II it had 'become a power co-ordinate with the king rather than subordinate to him, joining with him in all business of state, and not merely assisting but restricting his action'.<sup>1</sup> In this capacity it is recognized by the Commons, who, early in the reign of Henry IV, ask that the Lords of the Council, as well as individual ministers, should be nominated in Parliament (1404), that they should be properly paid for their services, and that the procedure of the Council should be settled by fixed rules (1406). In every department of the executive, it was the duty of the Council to advise the Crown; and there

on accusation to the King without presentment before justices or matter of record, or by due process and writ original according to the law of the land.

<sup>4</sup> Hen. IV, c. 23. No man to be brought before the King's Council or *king himself* after judgment given in the Common Law Courts.

<sup>15</sup> Hen. VI, c. 4. The writ of subpoena only to be issued after security given for costs.

The protests of the Commons are very numerous; but if a petition was in the first instance addressed to Parliament they were not unwilling that it should be referred to the Council. In 14 Ed. III, c. 5, they legalize such reference in case of delay of justice ascertained by a committee of five (one bishop, two earls, and two barons), and in 31 Hen. VI, c. 2, they gave power to the Council to deal in a summary way with great offenders against public order, saving in a somewhat ineffectual proviso the rights of the Common Law Courts.

See also Baldwin, *The King's Council*, ch. xi.

<sup>1</sup> Stubbs, *Const. Hist.* iii. 247. Cf. Baldwin, *The King's Council*, pp. 145, 146.

soon follows the assumption by the Council of judicial powers which to some extent supplemented, to some extent superseded, the action of the Courts.

During the infancy of Henry VI the Council added to its consultative functions those of a Council of Regency; and it was nominated not merely in Parliament but by Parliament. It was composed so as to represent all parties, filling vacancies by co-option as a rule; its members were salaried and sworn. A series of Ordinances (1424–30) regulated its procedure. On the attainment of his majority by the King, this practice ceased; the Commons relaxed their attempts at control, and the Council became the nominees of the Court. Under the weak rule of Henry VI the commoners and men of business became fewer at the Council Board.<sup>1</sup> There was nothing like the active body of King's servants under Richard II. Great lords of the Lancastrian side took their place, and the powers both of the Commons and of the Council at this period increased at the expense of the personal influence of the Crown. But this limitation of royal power and influence was not accompanied by the practical advantages of good government.

The Commons had acquired an increased and extensive control over taxation and legislation, and by the practice of impeachment they could strike an individual minister, but as yet they had not learned to use this power so as to keep a steady and consistent criticism at work on the action of the executive.

The Council had become a committee for the discharge of executive functions, irresponsible, except in so far as responsibility was secured by the royal power of appointment and dismissal, and by the possibility that the Commons might exercise in individual cases their right to impeach. The range of duties undertaken by the Council was practically coextensive with the powers of the Crown. In judicial matters the complaints that the Council interfered with the action of the Common Law Courts continued for a while, but ceased after

<sup>1</sup> Fortescue on the *Governance of England*, ed. Plummer, p. 146; and see Mr. Plummer's note, pp. 295, 296. Fortescue very clearly distinguishes between the lords of the Council; the great officers (Chancellor, Treasurer, and Privy Seal) who might attend at their pleasure or on request; and the judges, barons of the Exchequer, and other lords who might be summoned on occasion. See Baldwin, ch. viii.

the reign of Henry IV.<sup>1</sup> The lawlessness of the country, and the difficulty of obtaining justice by the ordinary procedure of the Courts when great lords set the Common Law at nought, may well have reconciled the Commons to the intervention of the Council. But in part the cause was that the Council ceased to exercise any effective jurisdiction, and suitors abandoned hope of redress from it, and thus fewer applications to its intervention took place.

In truth at this time we get an outline of constitutional government which seems to disappear when we look into details. The King reigned by a strict Parliamentary title; the House of Commons had acquired a control over legislation and taxation;<sup>2</sup> the royal Council was exercising with apparent vigour the administrative powers of the Crown;<sup>3</sup> and yet 'the Treasury was always low, the peace was never well kept, the law was never well executed; individual life and property were insecure; whole districts were in a permanent alarm of robbery and riot'.<sup>4</sup> This local anarchy was wrought by great and rich nobles with the bodies of armed retainers who had followed them in the French wars, and now wore their livery and were maintained by their bounty. The course of justice<sup>5</sup> was impotent against these men: the King himself could scarcely resist any combination of them. The Wars of the Roses were a sequel to the long disorders of the fifteenth century.

### § 3. THE TUDORS

From the conclusion of the Wars of the Roses to the time of the Stuarts, from Fortescue to Bacon, the minds of political thinkers, practical or theoretical, seem to have turned towards the construction of a strong administration. Not only had the turmoil of the dynastic struggle created a longing for peace: the preceding disorder, and the insecurity of life and property which was not inconsistent with great constitutional progress, made men realize that an increase in the power and influence of Parliament was not all that was needed to make a nation prosperous and free.

The constitution of the King's Council for purposes of

<sup>1</sup> Stubbs, *Const. Hist.* iii. 252.

<sup>2</sup> Ibid. 250.

<sup>3</sup> Ibid. 255.

<sup>4</sup> Ibid. 270.

<sup>5</sup> Baldwin, *The King's Council*, pp. 205, 206.

administration was the problem set to himself by Sir John Fortescue, who troubles himself little as to the relations of Parliament to the servants of the Crown, but much as to the organization of an effective executive. The distribution of the work of the Council received much attention from Henry VIII and Edward VI; the course of its business was regulated; the precedence of its important members determined by Statute; committees of the Council were formed for special purposes or for attendance upon the King.

And, since the great nobles had been reduced by the Wars of the Roses in numbers, power, and prestige, the Council possessed no members of such individual weight or importance as would enable them to resist the royal will. It was an administrative machine of vast power, entirely in the hands of the Crown.

The period fancifully styled the New Monarchy, the period during which the Crown stands forth in active personal government more distinctly than at any time since the reign of Henry II, was at once the outcome of the executive weakness of the Lancastrians, and the source of the violent collision of Crown and Parliament under the Stuarts. But it should be remembered that the people were as willing to be governed as the Tudor kings and queens were able and willing to govern; that there was a solidarity of feeling between the members of the State which was weakened by the advent of a foreign dynasty; and that throughout the reign of Henry VIII Parliament seemed ready to confer upon the Crown any powers which Henry VIII might be pleased to ask. Safety and prosperity were preferred to abstract liberty and anarchy.

Henry borrowed money without consent of Parliament, but he obtained from Parliament a release from the obligations incurred to the lenders. Parliament gave him the power of devising the Crown, enabled him to issue Proclamations which should have the force of law, and enacted that a king, when he reached the age of twenty-four, might repeal any statutes made since his accession; above all it was Parliament, embodying the acts of Convocation, that made the King the legal head of the national Church, and it was Parliament that passed the many acts of attainder which give a tragic colour to the concluding years of this reign.

In two respects we see the Crown in the reign of Henry VIII developing a policy and exercising powers, doubtless then essential, which became formidable when, as happened in the succeeding reigns, individuals began to desire a free expression of opinion on matters affecting Church and Commonwealth, and when Parliament revived its interest in public affairs.

(1) One of these developments of executive power is manifested in the judicial action of the Council. The administration of the Common Law had been committed to the three great Courts, the King's Bench, the Common Bench, and the Exchequer. The imperfections of the Common Law were supplemented in the Chancery, where the Chancellor was the mouthpiece of the King's grace, but the indefinite residue of the judicial powers of the King was administered by the Council. Of the obscurity which overhangs the growth of these powers, and of the relations of the Council and the Star Chamber, we will speak in a later chapter. Here it is enough to note the compass and detail of the judicial work which the Council is found to be doing when, after a long gap in its records, we can once more follow its action in the reign of Henry VIII.<sup>1</sup>

These powers were not designedly exercised by the Crown at the expense of the liberties of the subject. The Common Law Courts were limited both in scope and in process, costly and difficult of access to poor men, they were not effective against rich or powerful wrongdoers;<sup>2</sup> conspiracies which survived from the dynastic wars needed to be met by prompt and secret action; ecclesiastical changes, and the growth of a Press, raised new questions to which existing rules of law supplied no answer. Petitions for redress of grievances were laid before the Council; often it was only here that justice could be obtained speedily and at small cost by the poor; often too it was only here that justice could be obtained at all by the weak. It was only by degrees and virtually under the Stuarts that the Court of Star Chamber became a Court

<sup>1</sup> No regular record of the proceedings of the Council is extant between 1435 and 1540. As to the variety of judicial business transacted by the Council in the reign of Henry VIII, see *Proceedings and Ordinances of the Privy Council*, vii, p. xxv. Cf. Baldwin, *The King's Council*, pp. 428-48.

<sup>2</sup> *Collectanea Juridica*, ii. 14.

for the restraint by an arbitrary procedure of the free expression of opinion on political subjects, that it enforced illegal proclamations by unauthorized penalties, that it no longer supplemented but interfered with the ordinary course of justice in the Courts of Common Law, and could be made a formidable engine of oppression.

(2) Henry VIII began the practice of increasing the numbers of the House of Commons by additions to the constituencies, a policy which was developed, in the hands of his successors, by a free use of the prerogative in granting charters to towns.

The statutory requirement that a member should be resident in his constituency had fallen into disuse,<sup>1</sup> and a seat in Parliament had not yet begun to be an object of ambition. Henry VIII had therefore no great difficulty in procuring the election to the House of Commons of many members who held places at the pleasure of the Crown, or who hoped to obtain such places, or who for one reason or another were willing to vote as the King or his minister might direct. The successors of Henry VIII<sup>2</sup> were not content to rely upon influence over existing constituencies; they issued writs of summons to boroughs which had never heretofore sent members, a process followed usually by a charter of incorporation, conferring upon the borough the privilege of sending members, and regulating the rights of election. In this way the numbers of the House of Commons were increased by more than one hundred members in the reigns of Edward, Mary, and Elizabeth, and the growing independence of Parliament was sought to be restrained by a larger infusion of nominees of the Crown.

The raising of loans without prior consent of Parliament, the exercise of a wide and indefinite jurisdiction through the Privy Council, and the acquisition of a Parliamentary influence by an increase of the representation and by the introduction of placemen and courtiers into the House of Commons,

<sup>1</sup> See vol. i: *Parliament*, pp. 98, 367.

<sup>2</sup> The constituencies added by Henry VIII, though considerable in number, were places which might reasonably demand representation: Cheshire and Chester, Monmouthshire and Monmouth, the towns and counties of Wales. The incorporation of these territories in England as integral parts demanded representation.

constitute the chief examples of prerogative and royal influence in the reign of Henry VIII. Many deeds undoubtedly cruel and unjust were done, and laws were passed which placed a dangerous power in the hands of the Crown; but to these matters Parliament was made a party, and any blame must be divided in such proportions as the student of history may see fit between a King who loved his own way, a complaisant legislature, and a people which was willing to forgo some measure of constitutional liberty for the sake of order and peace.

Under Edward VI and the Tudor queens the jurisdiction of the Council pressed more heavily upon freedom of opinion, and the franchise was conferred upon boroughs which were never intended to exercise an independent choice of members. Yet, in spite of the exceptional influence and control which these monarchs exercised in Council and in Parliament, we find that a complicated machinery is growing up which needs to be put in motion before effect can be given to the King's decision in the detail of administration; his will is all-powerful, but it must be expressed through his servants. Edward IV had been told already, by Markham, C.J., that he could not effect an arrest in person,<sup>1</sup> and James I had to learn that the King could not sit as judge in his own Courts.<sup>2</sup> An Act of Henry VIII<sup>3</sup> requires the concurrence of three of the King's servants for affixing the great seal, and the recorded Acts of the Council in the reign of Edward VI make various provisions as to the official signatures necessary to authenticate a document signed under the King's own hand.<sup>4</sup> It was held in Elizabeth's reign that a royal order was not a sufficient authority for the issue of the royal treasure.<sup>5</sup>

#### § 4. THE STUARTS

When James I came to the throne it was no longer easy to manage Parliament as it had been managed by the Tudors. The House of Commons had questioned some of the additions made by Elizabeth to the representation. It took an early opportunity of disputing the right of the Crown to interfere in elections or to determine disputed returns. The Stuarts

<sup>1</sup> 2 Co. Inst. 186.

<sup>2</sup> *Prohibitions del Roy*, 12 Co. Rep. 64.

<sup>3</sup> 27 Hen. VIII, c. 11.

<sup>4</sup> *Acts of the Privy Council*, iii. 366, 411, 500.

<sup>5</sup> 11 Co. Rep. 92.

did not venture to use to any extent the prerogative which the Tudors had so freely exercised of summoning boroughs by writ or conferring the right to representation by Charter.<sup>1</sup> The additions to the representation made in the reign of James I were in almost all cases revivals of rights fallen into disuse. But James I and Charles I raised other and bolder issues. The judicial powers of the Privy Council exercised in the Star Chamber, and the power of appointing and dismissing at pleasure the judges of the superior Courts, enabled the Crown to interfere with the freedom of the subject, to legislate and to tax in defiance of Statutes passed in earlier times, in defiance even of the Petition of Right, which was aimed at existing encroachments of the prerogative.

It is possible that the difficulty of managing Parliament or increasing the number of its members may have induced the Stuarts to fall back upon unparliamentary methods, especially as Parliament was unduly reluctant to grant adequate supplies to meet emergent needs. But the circumstances of the time offered some justification for these methods. The decay of feudalism left men in want of some theory of political duty which should supply the place of the feudal bond, and the Reformation, which broke up the unity of Western Christendom, created the new problem of a national Church. The theory of the divine right of kings offered a solution of these difficulties, and it was eagerly embraced by the Stuarts and accepted by many of their subjects. Under the Tudors a desire for settled government had reconciled men to encroachments on liberty of person and security of property, and had encouraged the King to use the royal powers with freedom and boldness.

But those powers did not rest on political sentiment only: they had a firm basis in the control which the Crown possessed over the course of law.

So long as the King could use the indefinite jurisdiction of the Star Chamber for the infliction of punishments for political offences, it was possible for him to issue proclamations which would be enforced by fine or imprisonment in the

<sup>1</sup> In Ireland, on the other hand, James I shamelessly packed his Parliament asserting his absolute discretion: 'The more the merrier, the fewer the better cheer.'

Star Chamber, although disobedience to them might not constitute any offence recognizable by the Common Law Courts.<sup>1</sup> It is true that the use of this power by James I led to a precise definition by Sir E. Coke of the legal effect of such proclamations, a definition which is the *locus classicus* for the statement of the relations of Parliament and Crown in the making and enforcement of law.<sup>2</sup> But, so long as the Star Chamber was available for the enforcement of proclamations, there existed a judicial power residing in the executive, limited by no settled rules, exercisable at the royal discretion, and alleging the interests of government as the ground of its exercise.

Nor did the King's control of justice stop at the Star Chamber. He had an absolute power in the appointment and dismissal of judges: the judicial bench was, as to promotion and tenure of office, at his mercy; without exaggerating charges of corruption and subserviency, it is plain that self-interest as well as the traditions of a hundred years would lead the judges to take a broad view of the extent of their master's prerogative. Coke's dismissal was a cogent warning. And the course taken by the judges went far beyond mere latitude in the interpretation of the law; it led them to a point at which the sanction and validity of the law might be called in question, when the medieval maxim of the subjection of the king to the law was negated.

When a subject refused to pay a duty imposed or a tax levied without express consent of Parliament, the Courts, if they did their duty as we—in agreement with Coke—understand it, were bound only to consider whether there was authority by Statute or at Common Law for the demand made by the Crown. If an emergency necessitated the raising of money without the consent of Parliament, the Courts were not concerned with the existence of such an emergency; their business was to interpret Statute and Common Law. Imminent peril might justify the Crown in overstepping its legal powers, even after due allowance was made for the expansion of such powers in emergency; but the justification should be recognized, not in a decision by the Courts that in such cases

<sup>1</sup> Gardiner, *History of England*, viii. 73, 77.

<sup>2</sup> Vol. i: *Parliament*, p. 343; *Case of Proclamations*, 12 Co. Rep. 74.

as he might consider to be of national emergency the law did not bind the King, but in an Act of Indemnity passed by Parliament to relieve those who had done the royal bidding in breach of the law.

Nevertheless, the judges of James I and of Charles I were for the most part of the opinion of Bacon,<sup>1</sup> that their business was not merely to declare the law but to support the Government, to be 'lions under the throne' circumspect not to check or oppose any points of sovereignty. Acting on this theory they developed a doctrine of the discretionary prerogative which virtually set the King above the law. If, whenever a subject resisted an illegal demand, the Courts held that the demand was justified by a discretionary power resident in the King, they reduced themselves to a choice of difficulties. Either they must consider the circumstances of each case, must determine whether the use of this discretionary power was needed, and so must assume the deliberative functions of a Council of the Crown, or they must leave it to the King to say when this power should be used, and in that way must set the Crown above the law.

The last was the course which the judges adopted.<sup>2</sup> They thereby made the King independent of Parliament so far as revenue was concerned. Nor did their action affect revenue alone: all attempts to define the prerogative by rules of law were rendered nugatory when the Courts held that it was of the essence of prerogative to decide whether or no the law of the land should be observed. The powers in respect of

<sup>1</sup> Gardiner, ii. 191; iii. 2-8.

<sup>2</sup> 'In cases touching the prerogative, the judgement shall not be according to the rules of Common Law.'

'The king's power is two-fold, ordinary and absolute. . . . The absolute power of the king is applied for the general benefit of the people, and is *salus populi*, as the people is the body and the king the head; and as the constitution of the body varies with time, so varies this absolute law, according to the wisdom of the king, for the common good.' Judgment of Court of Exchequer in *Bates's Case* (1606), 2 St. Tr. 371. See also vol. i: *Parliament*, p. 361.

'That which is now to be judged by us is, whether one committed by the king's authority, *no cause of commitment being set forth*, ought to be delivered on bail, or to be remanded to prison.' The Court of King's Bench held that one so committed ought *not to* be delivered; *Darnel's Case* (1629), 3 St. Tr. 1. The Court was, however, virtually bound by the view of the judges given in 1592 as in 1 Anderson's Rep. 297.

legislation which the Star Chamber gave to the King by the enforcement of proclamations, though contrary to law, the Common Law Courts gave him, and as little in accordance with the rules of law, where the money, or the liberty, of the subject was concerned.

The Long Parliament took away the jurisdiction of the Privy Council in civil and criminal matters, and in so doing struck off the most formidable branch of the royal prerogative. It also in unmistakable terms precluded the King from raising money without consent of Parliament. But the episode of the Commonwealth did far more than legislation could do to affect the powers of the Crown as then existing.

The prerogative of the English king had not rested on an armed force for its maintenance, but on custom and respect for law, and to some extent on imagination, and an acceptance of the existing order of things as a part of the scheme of nature. The issue of the war between King and Parliament showed that there was no such miraculous attribute in allegiance or in the prerogative as would enable the King and his followers to resist superior numbers or superior organization. The nation learned that, in the last resort, force could keep the King within the bounds of law unless he had a greater force at his back. This greater force, now that feudalism had passed away, was represented by a standing army. The right to maintain a standing army became a practical question from the time of Cromwell.

And there remained within the limits of law a formidable weapon—the King could still dismiss the judges at pleasure. No attempt was made by Charles II to use this power in order to raise money: it would have been dangerous here to trifle with the stringent legislation of the Long Parliament, and Charles, alike from levity of temper and practical cleverness, was disinclined to run risks or to disturb his enjoyment of life for a mere extension of the powers of the Crown. The corruption of the House of Commons and the establishment of a system of Parliamentary influence were a safer and more effective way of getting what he wanted. When this failed he used his influence over the Courts to attack the charters of the boroughs, and the charters, when forfeited or surrendered, were remodelled so as to secure the ascendancy of

royal will in the choice of members. Finally, with the aid of French subsidies he dispensed with Parliament, but death cut short any plans he may have meditated to restore royal power. When the unhappy James II desired to get rid of the Statutes passed for the security of the English Church, the powers of the Crown over the judges were again used to obtain a judicial sanction for illegal acts. The King desired to dispense with the operation of a Statute and to do so with the sanction of the Courts of Law: he raised the question by means of a suit brought against the man in whose favour the dispensation was given, and secured such a decision<sup>1</sup> as he desired from a Bench reconstituted for the purpose.<sup>2</sup> Nor was he content with the misuse of the dispensing and suspending powers: the Commonwealth had taught him the importance of a standing army, and a standing army was in course of creation when the Revolution came upon him.

The Bill of Rights recited all the outstanding points of dispute between King and subject, the right to suspend laws or to dispense with their operation, the right to maintain a standing army among others, and decided them against the King; and the Act of Settlement took from the King the last of the prerogatives which enabled him to interfere with the course of the Common Law, or to override Statutes, when it provided that the judges should hold their office during good behaviour, but might be dismissed upon address of both Houses of Parliament.

Henceforth the theory of divine hereditary right, destroyed by the expulsion of James II and the negation of the rights of his innocent son, lived on only in the imaginations of those who mingled politics with romance. The Crown becomes the official representative of the community, to carry out its wishes so far as they are expressed or can be ascertained.

#### IV. THE PREROGATIVE SINCE 1688

##### § 1. THE DEPENDENCE OF THE CROWN UPON PARLIAMENT

The legislation of the reign of William III had done two things in respect of the royal prerogative. It had defined the

<sup>1</sup> *Godden v. Hales* (1686), 2 Shower, 275.

<sup>2</sup> The Chief Justice of the Common Pleas and the Chief Baron of the Exchequer with two puisne judges were dismissed.

legal rights of the Crown, and it had taken from the Crown the means of controlling the interpretation of those rights.

But, although in all administrative acts the King's pleasure could only be expressed through officers amenable to the Courts of Law, the determination of matters of general policy and the choice of ministers remained unaffected. In respect of these two things remained to be done in order to bring the exercise of the prerogative under the criticism and supervision of the estates of the realm. The first of these was to compel the Crown to have frequent recourse to Parliament, the second was to bring the choice and the action of the King's ministers under some sort of Parliamentary control.

The first of these objects was attained when Parliament limited the King's life revenue to such a sum as would barely enable him to conduct the civil business of government; when it legalized the standing army, and granted supplies for the national armed force every year, and for no more than a year.

The second was the gradual result of all the preceding limitations, whereby the King was made dependent upon the goodwill of Parliament for money and for legislation. His power over the purse was further limited by the appropriation of supply, and the fate of Danby<sup>1</sup> proved the danger of relying on royal commands as a defence. Nor, under the Bill of Rights, could a pardon granted beforehand shelter a minister from impeachment behind the irresponsibility of the Crown. He could not add to the borough representation by giving charters, for the Commons were prepared to question his right to add to their number: he could not tamper with existing boroughs by the forfeiture and remodelling of their charters, for the judges before whom the validity of such charters would be contested were no longer under his control, nor could the Crown risk the unpopularity of assaulting these jealous bodies.

Thus between 1688 and 1701 the King was precluded from the use of force, the misapplication of public money, the perversion of law; and was compelled to have recourse, in a country partly hostile, continually to a House of Commons whose composition he could not alter, and whose members he could not intimidate. He might, however, attempt the

<sup>1</sup> (1679) 11 St. Tr. 599.

corruption of the constituencies, and lavish public money for the acquisition of illegitimate power. George III was the last king who used this advantage, and thus lost an Empire. The King might also influence individual members by inducements of personal advantage. Hence Parliament inserted a clause in the Act of Settlement which never came into force, making office or place of profit, held of the Crown, incompatible with a seat in the House of Commons, and hence the legislation of 1707, and the official disqualifications created by subsequent Statutes.<sup>1</sup>

The House of Commons, in thus disabling office-holders, had failed to see that it had more to gain by bringing the King's ministers into dependence upon itself than by cutting itself adrift from the executive in fear of royal influence upon legislation, and, when the clause was repealed,<sup>2</sup> it seems that the essential point of the action was ignored. Through ministers alone could the Crown effectually communicate its wants to Parliament, and Parliament, by the readiness or reluctance with which it met the needs of the Crown, could indicate the amount of satisfaction with which it regarded the persons whom the Crown employed to conduct the business of government.

Since the Bill of Rights and the Act of Settlement have brought the prerogative within legal bounds which the King cannot transgress, it remains to ask, What is the discretionary power of the King, as the executive of the country, within those bounds? And the questions to be asked are three—

- (1) Is the King free to appoint and retain such Ministers as he chooses?
- (2) What is the influence of the King in the settlement of general policy?
- (3) How may the King act in matters of administration?

## § 2. PARLIAMENT AND THE CHOICE OF THE MINISTERS OF THE CROWN

Here is the only important point of contention between Crown and Parliament since the Revolution. The King has claimed to choose ministers irrespective of the wishes of the

<sup>1</sup> Vol. i: *Parliament*, pp. 85, 101.

<sup>2</sup> Jenks, *Parliamentary England*, pp. 114–19; 4 Anne, c. 8, s. 28.

House of Commons; the Commons have insisted that the ministers of the Crown shall be chosen from the political party which is in a majority in the House, and that their tenure of office shall depend on the retention of the confidence of that majority.

The composite Ministries of 1689–96 gave way to the Whig Ministry of 1697, as perhaps on the advice of Sunderland<sup>1</sup> William III recognized that he must rely upon one party or another if he wanted the support of a majority of the House of Commons for his policy; the Whig Ministry of 1697 passed by degrees into the Tory Ministry of 1700, as William perceived that a change of feeling in the country, represented by a change in the balance of power in the House of Commons, rendered desirable a corresponding change in his advisers. But William never contemplated responsible government, and it was in the reign of Anne that the necessary dependence of the Queen and her advisers upon one or other of the two great political parties became strongly marked.

Godolphin, the Lord High Treasurer, and Marlborough, the Captain-General, in the first Ministry of Anne, found the country committed to a European war the policy of which they approved. In this they differed from the bulk of the Tory party to which they belonged. They tried to create out of existing parties a following for themselves, but they had to learn by experience that it is difficult for more than two parties to exist where political feeling is strong. At this time there were two parties and no more. The Whigs were for war with France, for religious toleration, and for the Hanoverian succession. The Tories were for peace, were averse to standing armies, staunch upholders of the privileges of the Church, and somewhat lukewarm in their sentiments towards the Electress Sophia.

At the beginning of Anne's reign the war was the dominating feature in the policy of the country, and Marlborough and Godolphin on this point were not in accord with the bulk of the Tory party, nor did they favour the Anglican fervour of Nottingham; they could not convert their friends nor form an independent party of their own, and they were thus compelled to rely upon the support of the Whigs. In time the

<sup>1</sup> Cf. Jenks, *Parliamentary England*, pp. 86, 87.

Whigs claimed office as the price of support. But Anne was a Tory, and, though her chief ministers were willing to ally themselves with their political opponents, the Queen resented their demand that she should employ persons whose opinions she disliked. But the elections of 1705 gave the Whigs a real majority, and Anne was induced to replace the Tory Lord Keeper by the Whig leader in the Commons. When later in the full tide of military success Godolphin and Marlborough made the dismissal of Harley a condition of their retaining office, the Queen reluctantly dismissed Harley, and with equal reluctance allowed the great offices of State to be filled by Whigs. But she watched the turn of popular feeling, and when she became assured from the Sacheverell episode<sup>1</sup> that this was running in her favour, and that the Whigs were unpopular, she dismissed them *en masse* and recalled Harley and St. John. Her action was fully homologated by the victory given on the dissolution to the Tories.

In the history of the time the rudiments of party government appear. The personal wishes of the Queen have great influence; a ministry does not necessarily stand or fall together, but ministers of one party may replace ministers of another by a gradual process of change. And yet the opinion of the country represented by a majority in the House of Commons determines the Queen's choice, and by that opinion she must abide.

The first two Hanoverian kings were necessarily dependent upon the party which had placed their dynasty upon the throne. Political interest had languished throughout the country, but Parliamentary management<sup>2</sup> in the hands of Walpole became a means of securing a working majority to a minister who knew its secrets. Thus the House of Commons was used by the party managers to put pressure upon the King, and George II was constrained, not without grumbling, in 1744 to part with Carteret whom he liked, in 1746 to employ Pitt whom he detested. George III tried, and not without success, to get the machinery of Parliamentary corruption into his hands, to break up parties, and to destroy

<sup>1</sup> (1710) Hallam, *Const. Hist.* iii. 204.

<sup>2</sup> See vol. i: *Parliament*, pp. 373, 374.

all sense of collective responsibility in his ministers.<sup>1</sup> But the jealousy which was stirred by this extension of royal influence gave a new life to party loyalty. For the first time since the Jacobites had fallen out of practical politics, we now find a party, the Rockingham Whigs, bound together, not as embarked in a joint adventure in search of office, but as sharing some sort of common opinion as to the relations of King and ministers in the Constitution.

Little as the Parliaments of the eighteenth century could be said to represent the wishes of the people, yet the revival of political interest, stimulated by the war of American Independence, did put some constraint upon the inclinations of the King. Public opinion compelled the retirement of North (1782); confirmed the King's action in dismissing the Coalition Ministry (1783); and gave to the younger Pitt a majority in the Parliament of 1784, which made him comparatively independent of royal intrigues. This awakening of public opinion was intermittent, but, as the eighteenth century closed, the House of Commons became more independent; the grosser forms of corruption disappeared with Lord North. Still the likes or dislikes of George III could make or mar the fortunes of statesmen, could induce the ignominious resignation of Pitt in 1801, and drive the Ministry of Grenville from power. The influence of the royal wishes, though waning, was still perceptible throughout the Regency and the reign of George IV;<sup>2</sup> Canning in 1812 insisted on his right of choice.

The Reform Bill of 1832 made the House of Commons representative of the rising middle class and the manufacturing interest. Weight was thus given to a Parliamentary majority, and the increased interest in politics which creates and enforces party loyalty held the majority together. The pressure of such majorities upon the choice of the Crown now became irresistible. William IV did not ultimately resist it, and on Wellington's resignation accepted Grey as Prime Minister. The statement often made and long believed that

<sup>1</sup> Excuses may be made for George III by insisting on the lack of solidarity in ministries, but it is useless to ignore his lack of political insight.

<sup>2</sup> His assent to the Roman Catholic Relief Act, 1829, is a significant contrast with George III's position. For the discussion in 1812 see *Parl. Deb.*, 1st Ser. xxiii. 249 ff.

he dismissed Lord Melbourne's Ministry upon personal grounds, can no longer be accepted after the full account given by Lord Melbourne of the circumstances under which his Ministry came to an end.<sup>1</sup> Queen Victoria invariably, if reluctantly,<sup>2</sup> accepted the decision of the country as shown by a general election or a vote in the House of Commons. Ministers are the King's servants, but they are chosen for him by the unmistakable indication of the popular wishes given at the polling booth or in the division lobby.<sup>3</sup> Legal theory and actual practice here, as elsewhere in our Constitution, are divergent. The occasions when the choice of a Prime Minister has practically rested with the Sovereign are not real exceptions to this statement. Party lines may, for a time, become indefinite. They were so after the break up of the Conservative party in 1846, when the Coalition Government of Whigs and Peelites was formed by Lord Aberdeen in 1852. A more striking instance is that of the formation of a new Ministry in 1931. Or the leader of the party may not be obvious and paramount. Such was the case in 1859, when Queen Victoria, doubting if either Lord Palmerston or Lord John Russell would consent to serve under the other, asked Lord Granville to make an attempt, which proved ineffectual, to form a Government in which these two magnates would consent to serve under him. Similarly in 1894 the Queen's selection of Lord Rosebery was possible only because no Liberal statesman commanded the full support of the party.<sup>4</sup>

### § 3. THE CROWN AND ITS MINISTERS IN THE DETERMINATION OF POLICY

The business of government, like all other business, passes through two stages—the determination of policy or principle, and the working out of detail; the settlement of what is to be done, and the doing of it.

<sup>1</sup> *Melbourne Papers*, pp. 220–6.

<sup>2</sup> Viscount Gladstone, *After Thirty Years*, pp. 356–9.

<sup>3</sup> Thus in Dec. 1916 Mr. Lloyd George's selection as Prime Minister was due to the fact that inquiry elicited that a ministry under Mr. Bonar Law would not have been sustained on a division; cf. Addison, *Politics from Within*, ii. 267–76.

<sup>4</sup> Morley, *Life of Gladstone*, iii. 512, 513; Oxford, *Fifty Years of Parliament*, i. 223–34.

The general policy of the country, its foreign relations, proposed legislation, the principles of departmental management, are discussed and settled at the meetings of those great officers of State who are party leaders, and constitute the body known as the Cabinet, of which more hereafter. At these meetings the Sovereign has ceased to be present since the death of Anne. At meetings of the Privy Council the Sovereign is personally present, but the business at such meetings is of a formal character. When first the discussion of general questions of policy passed from the Privy Council to that inner circle of advisers which we call the Cabinet, a period which we may fix at the commencement of the reign of Charles II, the Sovereign presided alike in Cabinet and Council: the personal opinion and wishes of Charles, of William and of Anne,<sup>1</sup> formed an important factor in the discussions which took place and in the conclusions reached. George I had difficulties in understanding our language, which made his attendance at these meetings alike useless and irksome. He absented himself after 1717, and his example has been so consistently followed as to have become a settled custom.<sup>2</sup>

But the custom introduced by George I had far-reaching effects. The absence of the Sovereign from the meetings of ministers, at which the general policy of government is discussed<sup>3</sup> and settled does not alter the legal rights of the Crown, the legal liabilities of its ministers, or their legal relations to one another; but, if ministers are to settle affairs of State at meetings from which the King is absent, some one

<sup>1</sup> See a curious note by the editor of the *Hardwicke State Papers*, ii. 482.

<sup>2</sup> Todd (*Parliamentary Government in England*, ii. 115) records three instances of occasions on which the King has been present at a Cabinet meeting since the accession of George I. Two of these are formal meetings to lay before the King the draught of the speech to be made at the opening of Parliament (Hardwicke, *Life*, ii. 231; Hervey, *Court of George II*, ii. 555): the third is of very doubtful authority (*Waldegrave Memoirs*, p. 86). As exceptions from the established rule they are wholly unimportant. Note, however, that up to 1837 the Sovereign continued to attend Cabinets for the purpose of considering pardons; Thomson, *Secretaries of State, 1681–1782*, p. 110. Moreover, George I at first attended from time to time; Turner, *The Cabinet Council*, ii. 92–100, who cites some other cases.

<sup>3</sup> Responsible government in the Dominions was marked by the Governor's ceasing to preside in Cabinet; in Canada this was accomplished under Sir E. Head in 1854; *Can. Hist. Rev.* xiii. 376–8.

must preside at these meetings. The Prime Minister comes into existence, and the Crown recedes into the background.

No doubt it is through the agency of the Crown that ministers carry a policy into effect. If the King refuses to sign the necessary documents, or give the necessary assent, the thing which ministers wish to be done cannot be done. But ministers may say that they will not remain ministers unless their policy is carried out;<sup>1</sup> and Parliament may say, and the electorate may support it in saying, that it will have no other ministers and no other policy. The absence of the King from the Cabinet deprives him of a voice in the determination of that policy. A king who presides at a discussion upon which a decision is formed, and can note the views of his individual ministers, exercises an influence obviously greater than that of a king who merely receives the final decision of his ministers as the result of their collective opinion. The position of affairs has been reversed since 1714. Then the King or Queen governed through ministers; now ministers govern through the instrumentality of the Crown.

Another result of this retirement of the Sovereign from meetings of the Cabinet was to make him as free from responsibility in the determination of general policy as he had been for a long time in executive action. This could not be while the King took an active part in the discussions at which the policy of the country was settled. He was not regarded as free from such responsibility by his ministers, nor did he so regard himself. Danby, in 1679, formally pleaded a pardon under the Great Seal in bar of an impeachment. Somers, in 1701, alleged the King's command as his warrant for affixing the Great Seal to powers to treat and ratifications of treaties, and disavowed all responsibility for the terms of the treaties.<sup>2</sup> William III complained that the hesitating advice of his ministers threw upon him the responsibility of directing the movements of the fleet.<sup>3</sup> Yet he was not usually wanting in self-reliance, and Sunderland regretted that he did not oftener 'bring his affairs to be debated' before the

<sup>1</sup> Queen Victoria repeatedly had to yield on reminders that the alternative was the resignation of her ministers; cf. Lee, *King Edward VII*, ii. 34, 42-4.

<sup>2</sup> *Parl. Hist.* v. 1272.

<sup>3</sup> *Shrewsbury Correspondence* (Coxe), p. 68.

Cabinet.<sup>1</sup> It would seem as though the provision of the Act of Settlement, that a pardon should not be pleaded in bar of an impeachment, was designed rather to secure the liability of the minister than to remove that of the King.

The beginning of the change is noticeable in a curious debate<sup>2</sup> in 1711 on a motion of censure on the Queen's ministers for the mode in which they had carried on the war. 'For several years past', said Lord Rochester, 'they had been told the Queen was to answer for everything; but he hoped that time was over; that according to the fundamental constitution of this kingdom Ministers are accountable for all.'

It was doubtless largely due to the position occupied by the first Hanoverian kings that the non-intervention of the Crown in active political discussion passed so rapidly into a settled convention. But it was also inevitable that, when the primary responsibility of ministers came to be acknowledged, the King could not continue to act alone. If ministers are responsible for every act of the Crown they may fairly insist that such responsibility should not be laid upon them without their knowledge and consent. Hence there has come about a change in the whole character of the relations of the Crown to its ministers, since the reign of Anne. No act of state can be approached, resolved upon, or done, without the inevitable intervention of the responsible minister.

William III arranged the terms of the first Partition Treaty and induced Somers and Vernon to send him powers in blank, to enable him to conclude a peace with France on terms to which they were only permitted to give a hurried and formal approval.<sup>3</sup> Anne wrote dispatches and interviewed ministers.<sup>4</sup> Neither George I nor George II seems to have acted independently of his ministers in matters of executive government, foreign or domestic. Complications might well have arisen out of the martial instincts of George II, combined with his position as Elector<sup>5</sup> of Hanover. But he acted on the advice of his responsible ministers, and refrained, in 1729, from challenging the King of Prussia to a personal combat,

<sup>1</sup> *Hardwicke State Papers*, ii. 461.

<sup>2</sup> *Parl. Hist.* vi. 972.

<sup>3</sup> *Parl. Hist.* v. 1246-8, 1252.

<sup>4</sup> *Bolingbroke Letters*, 26 Dec. 1710 - 23 Oct. 1711.

<sup>5</sup> Cf. Ward, *Great Britain and Hanover* (1899); Chance, *George I and the Northern War* (1909).

and refused, in 1735, the flattering offer that he should take command of the Imperial army of the Rhine.<sup>1</sup>

George III, though he used all the resources of prerogative in the choice of ministers and in appointments to offices, never held private communications with foreign ministers. George IV for a short time broke through this rule, but Canning when he became Foreign Secretary insisted on its observance.<sup>2</sup> 'I should be very sorry', he says in 1825, 'to do anything at all unpleasant to the King, but it is my duty to be present at every interview between His Majesty and a foreign Minister.'

The Sovereign does not, constitutionally, take independent action in foreign affairs: everything which passes between him and foreign princes or ministers should be known to his own ministers, who are responsible to the people for policy, and to the law for acts done. The private letters addressed by Queen Victoria and the Prince Consort to foreign princes, or received from them, if they touched upon politics, were shown to the Prime Minister or to the Foreign Secretary, or to both.<sup>3</sup> Edward VII was deeply interested in foreign policy, but always acted with the full assent of ministers.<sup>4</sup> But this was quite consistent with interviews on various occasions with foreign representatives without the presence of any British official.<sup>5</sup>

But, though the Sovereign of this country takes no independent action in foreign politics, and Edward VII never acted against ministerial advice, his interest in such questions is necessarily keen, his knowledge extensive, and the extent to which he may influence or assist his ministers in the settlement of diplomatic issues is considerable.

The circumstances attending Lord Palmerston's dismissal in 1851 show that Queen Victoria required to be clearly informed as to all communications with foreign powers, and to have an opportunity of expressing an opinion before any action was taken by her ministers.<sup>6</sup> And the memoirs of the

<sup>1</sup> Lord Hervey, *Court of George II*, i. 127; ii. 6.

<sup>2</sup> Stapylton, *George Canning and His Times*, p. 433.

<sup>3</sup> Martin, *Life of the Prince Consort*, iv. 433; cf. her action in 1897 (*Letters*, 3rd Ser. iii. 150–62) in favour of Greece.

<sup>4</sup> Lee, *King Edward VII*, ii. 725–35.

<sup>5</sup> e.g. with Isvolsky in 1904; *ibid.* 283–7.

<sup>6</sup> *Parl. Deb.*, 3rd Ser. cxix. 90.

years 1859, 1861, and 1864 furnish abundant evidence of the influence which the Sovereign of this country may exercise on diplomatic issues. In 1859,<sup>1</sup> and 1864,<sup>2</sup> in European issues, and as regards the recognition of the Southern States in the Civil War,<sup>3</sup> Queen Victoria pressed upon Lord Palmerston and Lord John Russell the views entertained by a majority of the Cabinet, in opposition to the adventurous or meddlesome lines of conduct to which those two distinguished statesmen were respectively inclined. Royal influence saved the country from the risk, at any rate, of becoming involved in a European war. In 1861 a grave crisis in our relations with the United States resulted in a happy issue, largely owing to the redrafting of a dispatch by the Prince Consort, who was at that moment stricken with mortal illness.<sup>4</sup> But the Queen's objections in 1890 to the surrender of Heligoland were overruled.

The same rule applies in domestic affairs. When George IV desired that the prerogative of mercy should be exercised in the case of a person sentenced to death in Ireland, and wrote privately to that effect to the Lord Lieutenant, Sir Robert Peel, at that time Home Secretary, remonstrated with him strongly on the impolicy of his action; intimating also, very plainly, that the advice of the minister responsible for the exercise of this prerogative ought to have been taken before the King wrote to the Lord Lieutenant. The King gave way.<sup>5</sup> Nor in 1891 did Queen Victoria persist in her desire to save the Senapati of Manipur from the scaffold.

And this responsibility is clearly understood and accepted by ministers. Perceval and Canning indeed refused to accept responsibility in 1807 for the dismissal of their predecessors, but even then their views were contested and are now obsolete. When, in 1834, Sir Robert Peel accepted office in succession to Lord Melbourne, he believed, erroneously, that Melbourne had been dismissed by the King, and he recognized

<sup>1</sup> Fitzmaurice, *Life of Lord Granville*, i. 349–61. Cf. A. Fitzroy, *Memoirs*, i. 264 f. <sup>2</sup> Ibid. 459–70; *Letters*, 2nd Ser. i. 168.

<sup>3</sup> Gardiner, *Life of Sir W. Harcourt*, ii. 611. On this head Gladstone also was in the minority.

<sup>4</sup> Martin, *Life of the Prince Consort*, v. 422.

<sup>5</sup> Wellington *Dispatches*, Civil S. vi. 313, 319; Parker, *Sir Robert Peel*, ii. 146–51.

that by taking office he had made the dismissal his own act. 'I should,' he says, 'by my acceptance of the office of First Minister, become *technically*, if not *morally*, responsible for the dissolution of the preceding Government, though I had not the remotest concern in it.'<sup>1</sup>

#### § 4. THE CROWN AND ITS MINISTERS IN ACTION

The King is practically irresponsible for the conduct of Government. 'Ministers', in the words of Lord Rochester, 'are accountable for all.' If the affairs of the nation are ill conducted; if the policy of the Foreign Office involves us in war, or otherwise complicates our relations with other States; if the War Office, the Air Ministry, and Admiralty leave us insufficiently provided with men, arms, ships, and aeroplanes; if the Home Secretary misdirects the use of the prerogative of mercy, the ministers of the day collectively or individually suffer in the public esteem. An individual minister may be forced to resign, or the representatives of the people in Parliament, or the people themselves at a general election, may withdraw their confidence from the Ministry as a whole; a vote in the House of Commons, by the choice of representatives at a general election, may effect a transfer of political power to another party in the State. Any of these things may happen, but no one would attribute blame to the King. The House of Commons, Mr. Balfour insisted in 1905, can dictate a dissolution whatever the King's view.<sup>2</sup>

But responsibility for policy, and for the general results which follow upon such policy, is a moral responsibility, enforced, it may be, only by loss of esteem, at worst by loss of place and power, if the advice given and the consequent action taken is unwise and results in disaster.

Legal irresponsibility is a different matter. The maxim 'the King can do no wrong' has two meanings. The King is not responsible for mistakes of policy however gross; he acts on the advice of his ministers. And further, the King is not responsible when he acts on the advice of his ministers, even though the action thus taken is contrary to law. And

<sup>1</sup> *Sir Robert Peel's Memoirs*, ii. 31; Lord Aberdeen in *Queen Victoria's Letters*, 1st Ser. iii. 364.

<sup>2</sup> Lee, *King Edward VII*, ii. 188.

yet the King is not above the law ; every act of a department of government is the King's act, and to many important acts of state the King is directly a party. He summons, prorogues, and dissolves Parliament ; appoints to all the great executive, judicial, and spiritual offices ; makes peace, war, and treaties ; confers dignities,<sup>1</sup> grants charters, authorizes the spending of public money, sets in motion the judicial circuits : for these and any other acts which the King must do in his official capacity some one is responsible, and if the law is broken legal responsibility attaches to the law-breaker. But the King is not legally liable for acts done in his service or by his command, and we find the practical check on royal action in the rule that the King's command is no excuse for a wrongful act.

The consequence of this freedom from legal liability does not promote—indeed it tends to fetter—the independent action of the Sovereign.

The legal irresponsibility of the King may not unnaturally cause a reluctance on the part of his servants to carry out commands, in matters of doubtful legality, since they, and not he, would be liable for the consequence of acts done. The King's command is no excuse for a wrongful act, and whether the wrongful act takes place at the direct instance and instruction of the King, or is done in the course of the service, civil or military, of the Crown, he who has committed the crime or done the wrong is personally liable.<sup>2</sup>

But there are acts of executive government which must be done directly by the King, and here we find that ministerial responsibility is secured by the requirement that a seal should be used of which a minister has the custody, or that the counter-signature of a minister should be affixed to the document which gives authority for the act.

It may be said at once that there is hardly anything official which the Sovereign can do without the intervention of written forms, and nothing for which a minister is not responsible.

Ministers enter the service of the Crown by kissing the

<sup>1</sup> There is an exception in the case of the Royal Victorian Order which is purely a personal order controlled by the Crown (*Parl. Pap.*, Cmd. 1789, p. 5), and apparently in that of the Order of Merit, created by Letters Patent, 23 June 1902; Lee, *King Edward VII*, ii. 98–100.

<sup>2</sup> Dicey, *Law of the Constitution*, ch. xii. See ch. xii, *post*.

King's hands, but there are formalities which attend the assumption of all offices, the delivery of seals, a key, or a staff, the execution of a document involving the use of the sign manual and counter-signature of one or more ministers,<sup>1</sup> in some cases the employment of the Great Seal.<sup>2</sup> The President of the Council is appointed by simple declaration, and members of the Privy Council are admitted without form on kissing the King's hands and taking the Privy Councillor's oath, but these things are done at a meeting of the Council;<sup>3</sup> and a register is kept of every transaction which takes place at these meetings.

But there is a limited range within which a king may act without formality and yet with effect.<sup>4</sup> The great political offices are held during pleasure, and the King might no doubt, as did George III, send a message to a Secretary of State and desire him to deliver up the Seals, or for the book of the Privy Council and strike out the name of a Councillor.

The King might also, while Parliament was sitting, enter the House of Lords, take his place on the throne, desire the House of Commons to be summoned to the bar of the House, and then and there dissolve or prorogue Parliament. These acts would be operative, but the King's ministers would be held responsible, and would decline to accept responsibility for acts done without their advice. A capricious use of the prerogative in these respects meets a practical check: for a king would now experience much difficulty in finding ministers to serve him under conditions in which they were credited by the public with acts done without their knowledge and probably contrary to their judgment. The precedent of Lord North is conclusive as a warning.

<sup>1</sup> The First Commissioner of Works is appointed by sign manual warrant countersigned by two Lords of the Treasury.

<sup>2</sup> The Postmaster-General is appointed, and the Commissions of the Treasury and Admiralty constituted, by Letters Patent under the Great Seal.

<sup>3</sup> An extract from Lord Iddesleigh's diary gives a lively description of the formalities of taking office: see *Life of Lord Iddesleigh*, by Andrew Lang, i. 262.

<sup>4</sup> Totally abnormal and extra-legal was the King's action in appointing the Duke of Argyll Chancellor of the Order of St. Michael and St. George in 1905, and his action had to be regularized by the Colonial Secretary's acquiescence in the appointment; Lee, *King Edward VII*, ii. 522, 523.

We may therefore dismiss from consideration these informal acts, and we may next dismiss those orders more or less formal which proceed from the judicial or administrative departments of government, and the acts done by such departments, in virtue of a delegated authority from the Crown, often regulated by Statute.

There remain numerous acts of state to which the Sovereign is an immediate party, varying greatly in their importance, from a proclamation for the summons of a Parliament or the ratification of a treaty, to a licence for a theatre. These formal expressions of the royal will are made in various forms and on the responsibility of various persons, as will be described below. Enough has now been said to show the limitation which law and custom have set to the exercise by the Crown of its executive powers, whether those powers are used in the choice of ministers, the determination of policy, or the doing of acts of state.

But the real influence of the Sovereign of this country is not to be estimated either by his legal or his actual powers as the executive of the State. The King or Queen for the time being is not a mere piece of mechanism, but a human being carefully trained under circumstances which afford exceptional chances of learning the business of politics. Such a personage cannot be treated or regarded as a mere instrument: it is evident that on all matters of state, especially on matters which concern the relations of our own with other States, he receives full information, and is enabled to express if not to enforce an opinion.<sup>1</sup> And this opinion may, in the course of a long reign, become a thing of great weight and value. It is impossible to be constantly consulted and concerned for years together in matters of great moment without acquiring experience, if not wisdom. Ministers come and

<sup>1</sup> Illustrations of this statement are furnished by the memorandum communicated at the Queen's desire to Lord Palmerston in 1851 (see p. 138, *post*); and by the correspondence which passed between the Queen and Archbishop Tait in 1869 as to the action of the House of Lords in respect of the Bill for the Disestablishment of the Irish Church; Davidson, *Life of Archbishop Tait*, vol. ii, ch. xix. The Irish Conference of 1914 which sought to settle the Home Rule issue was doubtless in part due to the initiative of King George V; Oxford, *Fifty Years of Parliament*, ii. 154–8. For Queen Victoria's attitude on the redistribution issue in 1884, see Viscount Gladstone, *After Thirty Years*, pp. 360–5.

go, and the policy of one group of ministers may not be the policy of the next, but all ministers in turn must explain their policy to the Executive Sovereign, must effect it through his instrumentality, must leave upon his mind such a recollection of its method and of its results as may be used to inform and influence the action of their successors. Edward VII insisted systematically that his position on this head must never be ignored.<sup>1</sup> Moreover, he secured the communication to the Prince of Wales of full information, a privilege only very slowly and reluctantly conceded by Queen Victoria.<sup>2</sup>

## § 5. EXECUTIVE ACTS DONE BY THE CROWN

### A. *Forms in which the King's Pleasure is expressed*

The King's pleasure is expressed for administrative purposes in one of three ways:

1. By Order in Council.
2. By order, commission, or warrant under the sign manual.
3. By Proclamations, Writs, Letters Patent, or other documents under the Great Seal.

(1) An Order in Council is, practically, a resolution passed by the King in Council, communicated by publication or otherwise to those whom it may concern. It runs thus:<sup>3</sup>

At the Court at ——, the — day of ——, 19 .  
Present, —

The King's most excellent Majesty in Council.

His Majesty, by and with the advice of his Privy Council, doth order and it is hereby ordered . . .

Then the substance of the order follows. Such a resolution may be embodied in a royal proclamation.

A royal proclamation is a formal announcement of an executive act, such as a dissolution or summons of Parliament, a declaration of war or peace, a declaration of emergency under the Emergency Powers Act, 1920, the enforcement of the provisions of a statute (e.g. the Coinage Acts),

<sup>1</sup> Lee, *King Edward VII*, ii. 50, 51, 455, 456, 479, 480.

<sup>2</sup> Ibid. ii. 290, n. 1.

<sup>3</sup> There is normally a preamble reciting the authority for the issue of the Order.

the operation of which is left to the discretion of the Crown in Council. The act is a resolution of the King in Council, but the document by which it is promulgated—the Proclamation—passes under the Great Seal.<sup>1</sup> The Order bears the seal of the Privy Council.

(2) Passing on to those documents which do not proceed from the Privy Council, but from the department of a responsible minister or ministers, we find that they consist of sign manual warrants, commissions, and royal orders.

A sign manual warrant may be an executive act, or may be merely an authority for affixing the Great Seal.

Under the first head fall appointments to various offices. For instance, in the case of stipendiary magistrates the sign manual warrant is countersigned by the Home Secretary; in the case of the Paymaster-General and the First Commissioner of Works and Public Buildings, the warrant is countersigned by two Lords of the Treasury.

Under the same head falls the exercise of various statutory powers by the Crown; as for instance the abolition of purchase in the army by royal warrant, when Queen Victoria acted under the provisions of 49 Geo. III, c. 126: or the exercise of the prerogative of pardon, in this form, as provided by 5 Geo. IV, c. 84.

But a very frequent use of the sign manual warrant is to authorize the affixing of the Great Seal to Letters Patent. There is then transmitted by the Crown Office through a responsible minister to the King, a document, consisting of three parts: (1) the warrant which must be signed by the King and countersigned by a Secretary of State, and which constitutes the authority for affixing the seal; (2) the patent, to which the seal is to be affixed; and (3) the docket.

The *docket*<sup>2</sup> is a short note, for the information of the King, of the purport of the Letters Patent, and the name of the

<sup>1</sup> For the form of a proclamation, see vol. i, ch. iii, § 4. It becomes effective on publication in the *Gazette*: *Johnson v. Sargent and Sons*, [1918] 1 K.B. 101. For the rules of publication, see S.R. & O. 1916, No. 550.

<sup>2</sup> There is another sort of docket, which is a separate instrument, accompanying all Letters Patent and descriptive of their tenor. It is not sent to the King, but is stamped as required by the Stamp Act (54 & 55 Vict. c. 39), and is kept by the sealer as an authority for sealing. For forms of letters patent and sign manual warrant, see Appendix §§ 1, 2.

Secretary of State by whose order they are prepared. It runs thus :

May it please your most excellent Majesty.

This contains a warrant to the Lord High Chancellor to pass letters patent, [the object is here shortly stated.]

And this warrant is prepared according to your Majesty's command, signified by Mr. Secretary —.

J. M. Clerk of the Crown.

A royal order under the sign manual, as distinct from a sign manual warrant, seems to occur only in the case of an order for the expenditure of public money, as appropriated for the service of the year. It has taken the place of a number of sealings and warrants which were once required.<sup>1</sup>

An appointment to office by *commission* where the commission is not conferred by Letters Patent under the Great Seal, differs but little from an appointment by sign manual warrant. The Viceroy of India is appointed by *warrant* under the sign manual, the governor of a colony by *commission* under the sign manual and *signet*; the first appointment of an officer in the army is by *commission* under the sign manual and the second secretarial seal.

(3) The documents to which the Great Seal is affixed are Proclamations, Writs, Letters Patent, and the documents which give power to sign and ratify treaties.

A *Proclamation* as described above is an announcement of some matter which the King in Council desires to make generally known to his subjects.

A *Writ* is a mandate addressed by the executive to an individual requiring him to do, or forbear from doing, some act. The great majority of writs issue from the High Court of Justice, or from inferior Courts, under their seals, in virtue of the delegated judicial power of the Crown. But certain writs pass the Great Seal, and are a more direct expression of the royal will; such are writs for the election of members, addressed to the returning officers of boroughs and counties, and writs of summons to individual peers.<sup>2</sup>

<sup>1</sup> 29 & 30 Vict. c. 39, s. 4. For the form of such an order see Appendix § 7.

<sup>2</sup> For many purposes the Crown Office Act, 1877, enables a wafer impression of the Great Seal to be used. For the formal documents thus to be sealed, see S.R. & O. Rev. 1904, II. 14-19; 1916, No. 673; 1917, No. 22; 1919, No. 1558; 1927, No. 30.

*Letters Patent* are an open document to which the Great Seal is affixed ; such a document is used for various purposes. It may be used to put into *Commission* powers of various sorts inherent in the Crown—legislative powers, as when the King entrusts to others the opening of Parliament, or the duty of assenting to Bills;<sup>1</sup> judicial powers, as when the judges are sent upon circuit, to clear the jails, to hear and determine felonies and the like, or to take assizes ; executive powers, as when the duties of Treasurer and Lord High Admiral are assigned to commissioners of the Treasury and Admiralty. It is used to constitute a corporate body by charter ; to confer offices, as judgeships of the High Court, or professorships of Civil Law or Divinity at Oxford, or places in the College of Arms ; or to confer dignities, as for the creation of peers;<sup>2</sup> or to pardon one charged with crime who is required as a witness for the Crown. It is used to grant to a Dean and Chapter a licence to elect a bishop, or to Convocation a licence to confer for the purpose of amending or altering canons.<sup>3</sup>

For the purpose of making a *Treaty*, the first stage in the proceedings is the grant of powers to representatives of the Crown to negotiate and conclude the treaty. For this purpose an instrument is prepared containing full powers to the minister or other person representing the Crown to negotiate or conclude a treaty, or convention, with the minister who is invested with similar powers to act for the State which is the other party to the transaction. To this instrument the Great Seal is affixed on the authority of a sign manual warrant countersigned by the Secretary of State for Foreign Affairs.

When a treaty is concluded it is signed and sealed in duplicate by the ministers representing their respective countries with their own seals. If the treaty contains, as is usual, a clause providing that it shall be ratified and ratifications exchanged at some future date and specified place, then until

<sup>1</sup> For the form of commission in case of Bills and Church Measures, see S.R. & O. 1926, No. 1412; 1927, No. 625.

<sup>2</sup> For the form, see S.R. & O. 1927, No. 425.

<sup>3</sup> It should be borne in mind that in the case of appointments to offices the minister responsible for the appointments ascertains the King's pleasure before the preparation of the more formal documents. The name of the person to be appointed is submitted in writing, which if approved is initialed by the King.

ratification neither side is bound by it. If there is no such clause, the treaty may take effect in accordance with the terms therein contained.<sup>1</sup> The power to ratify or reject is vested in different parts of the Sovereign power, according to the constitution of different countries—in a popular assembly, as the Cortes in Spain; in a second chamber, as the Senate in the United States; in the Executive, as the Crown in England, though in certain cases effect cannot be given to a treaty without legislation. When ratification is decided upon a warrant is again issued under the sign manual, countersigned by the Secretary of State, for affixing the Great Seal to an instrument ratifying the treaty. The instrument of ratification, which is in fact the treaty with the Great Seal affixed to it, is then exchanged, by the minister empowered to do so, for a ratification with corresponding forms from the other side. The ministers who exchange ratifications execute at the same time in duplicate a document of a less formal but very important character, a statement, sealed with their respective seals, that the ratifications have been exchanged. The document of ratification of the treaty by the foreign power with whom we are dealing, and the document attesting the fact that ratifications have been exchanged, are then deposited in the Foreign Office.

#### B. *Persons responsible for the Expression of the Royal Pleasure*

The Order in Council is made by the King ‘by and with the advice of his Privy Council’. Those persons who are present at the meeting of the Council at which the order is made may be held formally to assume the responsibility for what is done. But the real responsibility rests with the minister concerned.

The sign manual warrant or other document to which the sign manual is affixed bears the counter-signature of one or more responsible ministers. In case of Instructions given to a colonial governor, where no such counter-signature appears, the document is authenticated by the use of the Signet, one

<sup>1</sup> For the usages as to ratification, the distinction between tacit and express ratification, and the moral obligation not arbitrarily to refuse to ratify, see Wheaton, *International Law* (ed. Keith), i. 487 ff.

of the three seals for the use of which a Secretary of State is responsible. Since 1931 Governors-General may be appointed by Commission countersigned by the Dominion Prime Minister, but the Signet is only affixed by the order of the Secretary of State for Dominion Affairs. In the case of the Irish Free State and the Union of South Africa a Dominion equivalent of the Signet is used, all imperial intervention ceasing.

The Great Seal is affixed on the responsibility of the Chancellor, but, though he is primarily responsible, there are in most cases certain forms by which he is authorized or directed to use this final authentic expression the royal will.

These forms used until lately to be very complicated; their complication was due to the conflict between kings and their advisers in the fourteenth and fifteenth centuries. The King wished to order the use of the Great Seal without the intervention of any minister but the Chancellor; the Council and the Parliament were determined that at least one other officer of State, the keeper of the Privy Seal, should be a party to the transaction.<sup>1</sup>

An Act of 1535<sup>2</sup> settled the forms necessary for the most important purposes in which the Great Seal needed to be employed. Every gift, grant, or writing signed with the sign manual and intended to pass under any of the great seals<sup>3</sup> was to be brought to the King's Principal Secretary or to one of the Clerks of the Signet; a warrant under the Signet was then to accompany the document to the Lord Keeper of the Privy Seal, who in turn transmitted it with a like warrant under the Privy Seal to the Chancellor or other officer, in order that effect might be given in due form to the King's pleasure as expressed in 'gift, grant, or writing'. At some date subsequent to 1689 the Law Officers of the Crown were introduced into the transaction at its earliest stage. Legislation of the last century has reduced these forms to reasonable limits.<sup>4</sup>

<sup>1</sup> *Proceedings of the Privy Council*, vol. vi, Preface, pp. clxxxiv, clxxxviii, xcii, cxcvi. Cf. Baldwin, *The King's Council*, pp. 258 ff.

<sup>2</sup> 27 Hen. VIII, c. 11.

<sup>3</sup> There were Great Seals for England, Ireland, the Duchy of Lancaster, the Counties Palatine of Durham and Chester, and the Principality of Wales.

<sup>4</sup> Before 1851 a patent under the authority of a Secretary of State might pass through the following forms:

We can therefore consider, within these limits, the modes in which authority is given for affixing the Great Seal.

They are four:

A *fiat* of the Chancellor or Attorney-General, or warrant of the Speaker of the House of Commons.

An Order in Council.

A sign manual warrant.<sup>1</sup>

A sign manual warrant preceded by an Order in Council.

For certain purposes the Chancellor may order the use of the Seal without any previous signification of the King's pleasure. This is done in the case of some of the Commissions for holding circuits in England and Wales,<sup>2</sup> of Com-

1. Warrant, signed by King and countersigned by Secretary of State addressed to Attorney- or Solicitor-General to prepare a *Bill*.
2. Bill prepared, signed by Attorney-General and taken to Secretary of State's office for the King's signature. There called the Attorney-General's Bill.
3. Bill signed by the King, taken to Signet Office, there called the King's Bill, and there deposited. (For a description of the Signet Office, which was really a branch of the office of the Southern, afterwards Home, Secretary, see Thomas, *Departments of Government*.)
4. An attested transcript sealed with Signet, handed on to Lord Privy Seal's Office, bidding him direct Chancellor to make Letters Patent in prescribed form, taken to Privy Seal Office, and there deposited.
5. An attested transcript of the above, sealed with Privy Seal, with request for direction was lodged at Crown or Patent Office in Chancery. There an engrossment was made of it, and the Privy Seal and engrossment left at the Lord Chancellor's.
6. If Lord Chancellor saw no objection, he wrote his name under the grant, and the Great Seal was then affixed. (Nicolas, vi, pp. ccviii–ccx.)

The changes are as follows:

14 & 15 Vict. c. 82. Necessity for *Signet* abolished.

43 & 44 Vict. c. 103. Attorney- and Solicitor-General not to prepare warrants for Letters Patent.

47 & 48 Vict. c. 30. Necessity for *Privy Seal* abolished; and a warrant under H.M. sign manual, prepared by the Clerk of the Crown, countersigned by Lord Chancellor, one of the principal Secretaries of State, the Lord High Treasurer, or two of the Commissioners of the Treasury, is authority for affixing the Great Seal.

This is not to affect cases where the fiat, authority, or direction of Chancellor is sufficient.

<sup>1</sup> In the case of Letters Patent empowering Commissioners to open Parliament, or to give the royal assent to Bills, the sign manual warrant is a part of the document, or rather, the King's signature, as well as the Great Seal, is affixed to the Letters Patent. This is under 33 Hen. VIII, c. 21, s. 5. See also S.R. & O. 1926, No. 1412.

<sup>2</sup> This is true of the autumn assizes, and of the intermediate assize after Easter in Lancashire and Yorkshire. For the purpose of other circuits, the

missions of the Peace, of writs of summons to peers to attend Parliament on succeeding to the Peerage, of writs of *dedimus*, *supersedeas*, *mittimus*.<sup>1</sup>

Writs for by-elections to fill vacancies in the House of Commons are issued from the Crown Office on the authority of a warrant from the Speaker; Commissions of Escheat—now obsolete—on the *fiat* of the Attorney-General.

In certain cases the authority of an Order in Council is sufficient. A royal proclamation passes the Great Seal in virtue of such an order, and, though writs for a new Parliament are in practice issued on the authority of the proclamation for the summons of a Parliament, an Order in Council is usually made, directing the Chancellor of England and formerly the Chancellor of Ireland to issue the necessary writs.

In the great majority of cases the mode in which the authority is given is by a sign manual warrant countersigned by one of the principal Secretaries of State when Letters Patent are used to signify the royal pleasure, or when powers are given to conclude or ratify a treaty. On certain occasions the Lord Chancellor countersigns the warrant. The Lords of the Treasury might do so, but do not in practice.

In a few cases an Order in Council is required to precede the issue of the sign manual warrant. These occur in the grant of charters to towns or other corporate bodies, and also in certain cases when the warrant proceeds from the Colonial Office. For the Privy Council advises the Crown before a corporation is created and invested with privileges, and a colony, in default of any other provision for its government, is governed by the Crown in Council. An Order in Council was also passed in 1928 to authorize the issue of the warrant for the commission to the Counsellors of State to act for the King in illness.<sup>2</sup>

King signs two warrants, one to assign the judges to their respective circuits, the other containing the names of the King's counsel and of others who are to be put into the Commission.

<sup>1</sup> Writ of *dedimus* giving power to administer oaths—as in the case of persons newly placed on the Commission of Peace.

Of *supersedeas* to stay the exercise of a jurisdiction.

Of *mittimus* to authorize the removal of records from one Court to another.

<sup>2</sup> *London Gazette*, 4 Dec. 1928.

It will be understood that, although an Order in Council or a sign manual warrant, or both, may for certain purposes be required as authority for affixing the Great Seal, yet that all three are separate modes of signifying the royal pleasure, and that in each case either a body of Privy Councillors or an individual minister is rendered responsible for the action of the Crown.

### C. *Exceptional Omission of Usual Forms*

The forms above stated seem to comprise all the modes in which the royal will is expressed for executive purposes, and they show how many restraints are imposed on its expression by the interposition of responsible ministers.

Nor is any choice allowed to the Crown as to the necessity for an individual expression of consent, or as to the form in which it should be expressed if custom or rules of law require that the assent should be given in a particular form.

In cases of illness or of absence from the kingdom, the use of the sign manual has been dispensed with. A stamp has been allowed to be affixed under certain conditions when a King or Queen has, from weakness or pain, been unable to sign in person; and a Commission has from time to time been issued under the Great Seal to enable Lords Justices to sign on behalf of the King when he has been absent from the kingdom.<sup>1</sup>

Modern facilities of communication have made the appointment of Lords Justices unnecessary. The last five reigns have produced but one such Commission, in 1821. And the number of cases in which the sign manual is now required by Statute

<sup>1</sup> The following is the form in which that part of the Commission runs which gives authority to sign for the King. It is taken from the Commission of 1719.

'And our Will and Pleasure is, that the said William Archbishop of Canterbury, &c., by virtue of the authority granted by these presents, be, and shall be known, named and called by the name, Title, or Stile of Guardians and Justices of our said Kingdom, or our Lieutenants in the same; and that all Writs, Letters Patent, Commissions and other instruments or writings whatsoever, which should or ought to have or bear Teste by or under ourselves, shall bear Teste in and under the name of the First for the time being and the Stile of other Guardians and Justices of our said Kingdom, and of our Lieutenants in the same, in the form following, viz.: Witnesses, William Archbishop of Canterbury and other Guardians and Justices of the Kingdom,' *Com. Journals*, xliv. 40.

seems in the course of the last two centuries to have made Parliament more scrupulous as to the delegation of this royal function.

Henry VIII, Mary Tudor, and, it is said, William III, issued Commissions giving power to certain persons to apply a stamp of a certain form to such documents as should pass the sign manual.

In the last weeks of the life of George IV his infirmities made it difficult and painful for him to affix his signature to documents for which the sign manual was necessary. It was then considered that neither the King of his own authority, nor the King in Council, could make valid the expression of the royal will in any other way than by actual signature, and so a Statute<sup>1</sup> had to be passed providing that a stamp might be affixed in lieu of the sign manual; but the King, despite the irksome character of the duty, was required to express his consent to each separate use of the stamp,<sup>2</sup> and the document so stamped was attested by a confidential servant and a number of high Officers of State.

Again, until 1862, it was the practice that all commissions in the army should pass under the royal sign manual. The accumulation of commissions awaiting signature had reached 15,000. An Act was passed to enable the Queen, by Order in Council, to free herself from the duty of signing such commissions. It was argued in debate, on the authority of the precedent of Mary's reign, and of the commissions to the Lords Justices in the reigns of George I and George II, that the Queen could by virtue of her prerogative depute others to sign for her; but Sir G. C. Lewis pointed out that commissions had always passed the sign manual, that this practice had been recognized by various Statutes, including that of George IV just referred to, and that it could not safely be abandoned except on statutory authority.<sup>3</sup> Edward VII had such arrears to make good that he was compelled to use a stamp.<sup>4</sup>

In the case of the King's illness in 1928 a commission was

<sup>1</sup> 11 Geo. IV, c. 23.

<sup>2</sup> Stanhope, *Conversations with the Duke of Wellington*, p. 257.

<sup>3</sup> *Parl. Deb.*, 3rd Ser. clxv. 1483.

<sup>4</sup> Lee, *King Edward VII*, ii. 48.

issued<sup>1</sup> authorizing the Queen, Prince of Wales, Duke of York, Archbishop of Canterbury, Lord Chancellor, and Prime Minister, or any three of them, to hold Councils, sign documents, and do what was necessary for the safety and good government of the realm. But they were not to dissolve Parliament, grant titles or peerages, or act in any matter where the King had signified or they felt that his special approval was required. For Irish Free State documents only the royal persons acted.

<sup>1</sup> For partial precedents see Lee, op. cit. ii. 46 n. 1.

## CHAPTER II

### THE COUNCILS OF THE CROWN

#### I. THE COUNCILS BEFORE 1660.

##### § 1. THE GROWTH OF THE COUNCIL

THE King, as we have seen, never acts alone, and the Council has always been his assistant in government. He still often acts on the formal advice of the Privy Council and the general policy of his government is determined by the advice of the Cabinet.

It is now necessary to examine the history and the present circumstances of the three great Councils of the Crown: the House of Lords, with the judges and law officers who share in its summons; the Privy Council, necessary, as has been shown, for the transaction of certain formal acts of State; the Cabinet, which settles questions of general policy and determines the action which shall be taken by the departments.

The materials for the history are ample enough, but this does not make it easier to form conclusions as to the character of the King's Councils at any given times, in theory and in fact, or to mark the stages of transition by which we have reached the conditions of the present day.

Coke tells us that the King is assisted by four Councils: (1) the *Commune Concilium* or Court of Parliament; (2) the *Magnum Concilium*, or House of Lords; (3) the Privy Council for matters of State; and (4) the Council of the Law, consisting of the judges.<sup>1</sup> Hale also describes four Councils, agreeing with Coke as to the first two, but placing a *Concilium Ordinarium* between the *Magnum Concilium* and the *Concilium Privatum* and omitting the Council of the Law.<sup>2</sup> The last two Councils of Hale might be thought to correspond with the Privy Council and the Cabinet, but we must not apply modern ideas to the terminology of the seventeenth century. It will be better to try to ascertain what the four Councils of Hale really were.

Historical evidence<sup>3</sup> shows clearly that the medieval Council

<sup>1</sup> 1 Co. Litt. 110 (*a*).

<sup>2</sup> Hale, *Jurisdiction of the House of Lords*, ch. ii.

<sup>3</sup> See Baldwin, *The King's Council*, ch. i.

was essentially an indefinite body and that the only essential distinction is that between Council and Parliament as the latter is developed.

We can trace the process of development after the transformation of the Witan into the *Commune Concilium*, wherein the qualification for membership rested in part on the tenure of lands from the Crown, in part on royal service. Within this assembly of magnates developed the group of great officers of the household and of State, who, sitting with their staff of subordinates in *Curia* or in Exchequer, transacted the judicial and financial business of government. It would be an anticipation of modern ideas to say that the *Curia* was the executive, the *Concilium* the legislative and deliberative body,<sup>1</sup> for all kinds of business could be treated in any form of the Council, but this distinction between the two bodies tended to become more marked as the larger body came definitely to be regarded as an assembly of tenants-in-chief, the *Commune Concilium* of the Charter.

This assembly of tenants-in-chief in its turn gave way to the assembly of estates, the clergy, baronage, and commons, summoned in person or by their representatives to advise and assist the Crown in Parliament.<sup>2</sup> Here, if anywhere, is the *Commune Concilium* of Hale and Coke.

Meanwhile the executive and judicature defined themselves. The Chancery parted from the Exchequer in the end of the twelfth century; the Common Law Courts with their special jurisdictions became distinct in the course of the thirteenth: but there remains a Council which includes the great officers of State. The members of this Council have, in addition to such departmental duties as any of them might discharge, the duty and responsibility of advising and acting with the King.

This body, ill-defined as to constitution and powers, but always in immediate attendance upon the King, appears in

<sup>1</sup> Stubbs, *Const. Hist.* i. 387, 388.

<sup>2</sup> The term originally means only a colloquy and only gradually was it restricted to the colloquy of King and estates, and then to the Assembly. The Council of the King originally was part of the Parliament; cf. Fleta, ii, c. 2: 'habet enim rex curiam in concilio suo in parlimentis suis', the judges and others of the Council being summoned by Edward I, and the Council framed legislation, e.g. the Statute of Westminster I., 1285.

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special importance during the minority of Henry III. It is distinct from the larger deliberative assembly, the *Commune Concilium*, and from the judicial and financial staff which transacted the business of the Courts, the Chancery, and the Exchequer.

In the middle of the thirteenth century it had assumed so definite an existence that the mode of its selection forms an important feature in the Provisions of Oxford.<sup>1</sup> From the reign of Henry III we may say that, as an assembly, it had acquired a corporate character: its members were sworn as councillors of the Crown: general questions of policy were here discussed, and prepared, if necessary, for the consideration of the estates of the realm; finally, it was the medium through which the King, himself irresponsible, performed acts of state.<sup>2</sup> It is the *Continual Council*, though Council is its usual name.

Long after Parliament had come into existence, the Crown could legislate when acting with a body which was neither the Continual or King's Council nor the National Council, but the King's Council plus the estate of the baronage. Edward I used such an assembly, as well as his Council and Parliament in full session, for purposes of legislation.<sup>3</sup> Edward III tried to obtain grants of money from a body which consisted of Council, baronage, and a selected representation of the Commons.<sup>4</sup> Yet it is possible to distinguish these Great or General Councils of the magnates, occasionally summoned to advise the King, from Parliament on the one hand and the Continual Council on the other. The confusion clears away as the legislative rights of the Commons are recognized as in 1322, and insisted upon. The Great Councils were summoned from time to time on special occasions throughout the fourteenth and fifteenth centuries, and on these occasions they transacted business, other than legislative, such as might have been dealt

<sup>1</sup> See p. 30, *ante*.

<sup>2</sup> The order for expelling the Jews (1290) was made 'per regem et secretum concilium'.

<sup>3</sup> As in the passing of Quia Emptores; and see Stubbs, *Const. Hist.* ii. 26. See also Baldwin, *The King's Council*, pp. 307-14.

<sup>4</sup> *Rot. Parl.* ii. 253, 257, and see vol. i: *Parliament*, pp. 258, 341. Hale, *Jurisdiction of Lords' House*, p. 8, says, 'The form of these great Councils ever varied.'

with at the Continual or Privy Council.<sup>1</sup> On two occasions only was a Great Council summoned in the seventeenth century.<sup>2</sup>

The baronage, however, retains its position as an estate of the realm and a House of Parliament. Its functions as a Council survive in certain privileges of the House of Lords and its judicial authority, and in certain duties of the judges and law officers of the Crown may be seen the remnant of their connexion with the Council.

So we may leave the first two of Hale's Councils, and watch the developments of the Continual Council, a name common from 1376. If the minority of Henry III first gave a definite existence to this Council as a group of responsible advisers, the minority of Richard II was the time when its powers were defined as practically coextensive with the prerogative.<sup>3</sup>

The business of the Council covered the whole field of executive action: its members were at first appointed for a year, but this idea did not prove successful; they were bound to attend its meetings, and were paid for their services.<sup>4</sup> On attaining his majority the King increased its size, chiefly officers and knights.

We have already spoken of the attempts by the Commons to control the appointment of the Council, of their moderate success between 1377 and 1422, of their cessation after the latter date; these matters, together with the changes in the composition of the Council during the fifteenth and sixteenth centuries, relate to the limitations on the power of the King rather than to the constitutional history of the Council. Whether the Council was made up of great feudal lords, as under Henry V and in part in the later period of the Lancas-

<sup>1</sup> In the earlier part of the fourteenth century the Great Council is an assembly of the estates not sufficiently formal to be treated as a Parliament, but summoned under the Great Seal. From 27 Ed. III or 45 Ed. III it is summoned under the Privy Seal and treated as a Privy Council; Baldwin, *The King's Council*, pp. 106–8. After 1401 Knights of the Shires cease to be summoned.

<sup>2</sup> Such Councils were summoned by Charles I in 1640, and by James II in 1688. See Clarendon, *Rebellion*, ii, s. 34; Macaulay, *History of England*, ch. ix; Clarke, *Life of James II*, ii, 238.

<sup>3</sup> Stubbs, *Const. Hist.* iii; Baldwin, *The King's Council*, pp. 120 ff.

<sup>4</sup> Nicolas, *Proceedings of Privy Council*, i, p. v; and see lists of members of the Council, *ibid.* 237, 295; Baldwin, *op. cit.* pp. 124 ff.

trians, or of men of business of no great birth or estate, as under the first Tudors, or whether, as under Richard II's personal rule and in the earlier part of the fifteenth century, both these elements were present, the powers of the Council were much the same; only in the first case they might be used as a check upon the King; in the second, the King, himself irresponsible, might use the Council and its powers with formidable effect.

But assuming that from the end of the fourteenth century the Council was admitted to be—with the King, and subject to his initiative—the executive of the country, there are three points to be noted in its history between this date and the Rebellion. They are (1) the development of an outer and an inner Council; (2) the judicial powers of the Council; (3) the closer relations of Council and Parliament.

## § 2. THE ORDINARY AND THE PRIVY COUNCILS

The Councils of the fourteenth and fifteenth centuries were the Great Council, and the Continual or Privy Council,<sup>1</sup> the former summoned for special occasions, the latter in constant attendance upon the King. Between the years 1460 and 1540 there is a blank in the records of the Council, probably due to an eclipse in its importance and activity, and when we are able to resume the narrative of its proceedings we find that the Great Council has fallen into abeyance, and that the Privy Council has developed into two more or less distinct bodies. One branch, the *Concilium Ordinarium*, sat to do business especially judicial, in London.<sup>2</sup> The other, normally known as Privy Council, was in attendance on the King personally; it was sometimes divided into Committees,<sup>3</sup> to each of which some department of executive business was assigned.

Outside the body of Privy Councillors there are now a number of persons sworn of the Council, yet not habitually summoned to those meetings which are recorded as meetings of the Privy Council. The accounts which we have of the *Concilium Ordinarium*, whether we turn to the precise description

<sup>1</sup> The term 'Privy Council' dates from the reign of Henry VI (Nicolas, *Proceedings of Privy Council*, i, p. lxxii) but is found under Edward II.

<sup>2</sup> Baldwin, *The King's Council*, pp. 446–50. It is recognized in an Ordinance of 1526.

<sup>3</sup> Burnet, *History of Reformation*, v. 119.

by Hale,<sup>1</sup> or to less explicit references in documents of the Tudor period, show definitely that the *ordinary* counsellors were chosen mainly for legal or judicial purposes. Henry VIII, in November 1541, orders his Chancellor to summon his 'counsellors of all sorts, spiritual and temporal, with the judges and learned men of his Council',<sup>2</sup> to hear of the misconduct of Katherine Howard. The ordinary Council, however, does not correspond to Coke's 'Council of the Law',<sup>3</sup> which was confined to the judges, whereas among the ordinary counsellors were persons of rank and dignity,<sup>4</sup> and learned lawyers who had not attained to the Bench.<sup>5</sup> The judges' relations with the Council were not those of the new class of ordinary councillors, who were required to receive petitions, conduct examinations, and assist in trials in the Star Chamber and Court of Requests. Cases of promotion from the rank of ordinary to full Privy Councillor are not rare. Both types of councillor were, unlike the judges, duly sworn. We may be further justified in saying that occasional counsellors for non-legal matters were sometimes introduced.

After the close of the Tudor period we hear no more of ordinary counsellors, save in the later and inaccurate description of Hale.

The Privy Council itself underwent changes in the sixteenth century. It changed in number; there were eleven members at the accession of Henry VIII,<sup>6</sup> and twenty-five at the time that Edward VI came to the throne.<sup>7</sup> Mary's Council was much larger, rising at one time to forty-six. During the reign of Elizabeth the number dropped from eighteen to twelve. We find too a change in the composition of the Council as compared with the previous century. New men

<sup>1</sup> Hale, *Jurisdiction of the Lords' House*, c. ii; Baldwin, p. 112.

<sup>2</sup> Nicolas, *Proceedings of Privy Council*, vii, p. xix.

<sup>3</sup> Co. Litt. 110 a.

<sup>4</sup> As, for instance, the Bishops of London and Rochester and Lords St. John and Windsor; Nicolas, *Proceedings of Privy Council*, vii, p. xxii.

<sup>5</sup> The conciliar functions of the judges survive in the writ of attendance which they receive at the commencement of each Parliament (vol. i, p. 57). The learned men of the Council are to be found in the King's or Queen's Counsel learned in the law.

<sup>6</sup> Nicolas, *Proceedings of Privy Council*, vii. 4. From 1540 the *Register of the Privy Council* begins. There were then nineteen members, fifteen being officials, nine of them great officers of state. Tanner, *Tudor Const. Doc.*, p. 217.

<sup>7</sup> Burnet, *History of Reformation*, v. 117.

devoted to the business of official life and of no great weight in the country had been introduced by Edward IV; and officials pervade the Tudor Councils.<sup>1</sup> It is clear from Forescue<sup>2</sup> that the King's business suffered from the inattention of great lords, engrossed in their own affairs and in the advancement of their families and dependants, and he recommended the use of impartial experts.

The formal division of the Council into Committees took place under Edward VI with the assignment of the most important business to a Committee of State.<sup>3</sup> But under Mary and Elizabeth we hear only of temporary committees. During the last years of Elizabeth's reign the Council was greatly reduced in number, and nearly all its members held high offices. It was in effect a Cabinet Council. Under the Stuarts the numbers were increased; James I in 1623 had thirty-five. The Committee of State of 1553 reappears under that title in 1640, when it is also described as a 'Cabinet Council' by way of reproach.<sup>4</sup>

It seems almost inevitable that unless the entire Privy Council was often reconstituted the treatment of important matters must pass into the hands of a few. The Council would always contain men qualified for one cause or another to be Councillors of the Crown, but not possessed of the practical sagacity, promptitude of judgement, and force of character which come into play when some crisis calls for immediate action and nothing that can be done is free from risk. The men who possess these qualities would be the men to form the 'Committee of State', the 'junto', the 'Cabinet'.

<sup>1</sup> In 1536 the Yorkshire rebels complained that there were too many persons of humble birth in the Council: Henry VIII replied that it contained more of the nobility than when he came to the throne, but added that 'it appertaineth nothing to any of our subjects to choose our Council'; Nicolas, *Proceedings of Privy Council*, vii, p. iv; Gairdner, *Letters and Speeches*, xi, No. 957.

<sup>2</sup> *Governance of England*, ch. xv, ed. Plummer, p. 145.

<sup>3</sup> Burnet, *Hist. of Reformation*, v. 119. The King sat with this Committee for matters of most importance. Cf. Tanner, *Tudor Const. Doc.*, p. 217 f.

<sup>4</sup> The *Hardwicke State Papers*, ii. 147, contain the minutes of a Cabinet Council of 16 Aug., 1640, but the body concerned was apparently a reinforced Cabinet; Turner, *The Cabinet Council*, i. 317 ff. See too Clarendon, *History of the Rebellion*, bk. ii, ss. 61, 99. The term 'cabinet', denoting the King's closet, used in a political sense of an English Council, is found in 1628; Turner, p. 222.

### § 3. THE JUDICIAL POWERS OF THE COUNCIL

The severance of the Common Law Courts from the *Curia* had not exhausted the judicial powers of the Crown. Those who wanted remedies which the Courts of Law could not supply, and those who wanted redress which the Courts of Law could not enforce, came to the Crown as to the fountain of justice, and the Crown in Council did for the suitor what the King's grace might prompt. The Chancellor, who was usually a lawyer as well as an administrator, carried into the Chancery a good deal of the judicial work of the Council; but successive Chancellors gradually confined their jurisdiction to cases in which they supplemented the Common Law, and built up a body of equitable rules respecting uses, fraud, and the enforcement of contracts.

In the reign of Edward III, as we are told by Coke<sup>1</sup> and Selden,<sup>2</sup> there were three Courts into which writs *coram rege* were returnable: they were so returnable *in Banco*, *in Camera*, *in Cancellaria*—in the King's Bench, the Council Chamber, or the Chancery—and the coercive jurisdiction of the Council, though a subject of remonstrance on the part of the Commons, grew more necessary as the numerous households and retainers of the great lords<sup>3</sup> spread disorder for which the ordinary litigant had no remedy.

This jurisdiction served two objects, the assistance of the weak or the poor, and the maintenance of order.<sup>4</sup>

In the first of these cases the Council acted, as did the Chancellor, upon the receipt of a bill or petition, as contrasted with the writ of the Common Law Courts. In rules made for its governance in 1390 the Lord Privy Seal and others were to deal at once with the bills of persons of small importance; again in 1424 its members were enjoined in dealing with petitions not to meddle with such matters as were determin-

<sup>1</sup> Coke, 4 *Inst.*, c. 5.

<sup>2</sup> Selden, *Discourse on Laws and Government of England*, ii, c. 3.

<sup>3</sup> The great lords had councils of their own. See Fortescue, ed. Plummer, pp. 308–10. 16 Ric. II, c. 2, forbids lords or ladies to compel appearance before their councils on any disputed right to real or personal property under penalty of £20. The Act, 31 Hen. VI, c. 2, giving power to the Council to deal with cases of riot and oppression, has already been referred to; *supra*, p. 35.

<sup>4</sup> Baldwin, *The King's Council*, ch. xi.

able at the Common Law, unless they should 'feel *too great might on the one side, and unmight on the other*, or else other reasonable cause that should move them'.<sup>1</sup> Similar in character is an ordinance of 1443. In 1493 the records of a Committee to deal with the causes of poor persons begin. Wolsey, when Chancellor, established a Committee of the Council to sit 'in the Whitehalle' 'for the expedition of poore mennys causes depending in the sterred chamber'.<sup>2</sup> And to the same purpose it is provided in the Ordinance of 1526 for the household of Henry VIII, that of those members of the Council who were in constant attendance on the King, two should sit daily in the Council Chamber at certain hours to hear 'poor men's complaints'.<sup>3</sup>

We may follow this jurisdiction to its close. It became the Court of Requests, sitting in the Whitehall, consisting of certain members of the Council and some lawyers, 'Masters of Requests', to hear matters referred to it by the Council, or matters which came directly before it. The Masters of Requests were apparently at first sworn of the Privy Council, though as time went on they ceased to be reckoned among the Privy Councillors, and though sworn as counsellors to the King had no precedence among members of the Privy Council.<sup>4</sup> They dealt with cases resting on the suggestion, sometimes fictitious, that the suitor was either too poor to proceed at Common Law, or that he was a member of the King's household.<sup>5</sup> The parties came directly before the Court or were referred to the Masters of Requests after petition to the Council.<sup>6</sup> Judgements of the Court were enforced by writ of attachment under the Privy Seal.

But in the later years of the sixteenth century the Common

<sup>1</sup> Nicolas, *Proceedings of Privy Council*, i. 18; iii. 149; *Rot. Parl.* iii. 21, 446; iv. 201, 343.

<sup>2</sup> S.P. Dom. Hen. VIII, iii. 571 (MS. Record Office), set out in vol. xii of the Publications of the Selden Society, p. lxxxi (*Select Cases in the Court of Requests*).

<sup>3</sup> Ordinances for regulation of Royal Household, 159, 160, and see Nicolas, vii, p. viii.

<sup>4</sup> This change took place early in the seventeenth century; Selden Soc. Publications, xii, p. xli. See p. 78, *ante*.

<sup>5</sup> Lambarde, *Archeion*, p. 229.

<sup>6</sup> Memorandum by Dr. J. Herbert, Secretary of State, Selden Series, xii, p. xxv.

Law Courts took exception to a jurisdiction which deprived them of litigants and of fees. The judges, in assailing the Court of Requests with writs of prohibition, treated it as a new Court created under the early Tudors, with neither statutory authority nor immemorial custom to support its jurisdiction. The validity of the writ by which obedience to the orders of the Court was enforced was challenged in the Common Pleas in 1598, and it was held that 'the Court of Requests or the Whitehall was no Court that hath a power of Judicature'.<sup>1</sup>

This, in the view of Coke, terminated the existence of the Court, though he speaks with regret of its discontinuance. But he was premature: the need of cheap and speedy justice prevailed over the alleged infirmity of jurisdiction; and the Masters of Requests, presided over by the Lord Privy Seal, did a large judicial business throughout the reigns of James I and Charles I. Even the Act for the abolition of the Court of Star Chamber, which would seem to have taken away from the Privy Council all jurisdiction exercisable by the ordinary Courts of Justice, did not, as far as law goes, interfere with the action of the Court of Requests. But it ceased to sit in the troubled times of the Civil War (1642), and was not revived by Charles II.<sup>2</sup>

In the Court of Requests the Council exercised a civil jurisdiction in the interest of those who wanted to get justice cheaply. But there was another class of cases in which the strong hand of the executive was needed. Here the Council dealt with offences against order, misconduct of ministers, disregard of proclamations, fraud, forgery and the mutilation of documents, perjury, conspiracy, and, later, trade offences; these were punished with fine, imprisonment, the pillory, loss of ears, and whipping.<sup>3</sup>

This seems to have been an original jurisdiction of the

<sup>1</sup> *Stepney v. Flood*, 4 Co. Inst. 97. Cf. *Paine's Case* (1608), Yelv. 111; *Penson v. Cartwright* (1615), Cro. Jac. 345.

<sup>2</sup> The Committee of Council, appointed 7 Feb. 1667 (when there was a general rearrangement of the Committees), to deal with petitions and grievances, was forbidden 'to meddle with questions of property, or what relates to *meum & tuum*'; *Register of Privy Council*, Charles II, vii. 173. See also Selden Series, xii, pp. 1, li.

<sup>3</sup> *Acts of the Privy Council*, ed. Dasent, i. 39, 105, 124, 209. See Leadam, *Select Cases in the Star Chamber*, Selden Series, xvi, xxv.

King's Council, sometimes, but not necessarily, exercised in the Star Chamber. The often-cited Act 3 Henry VII, c. 1 constituted a committee of the Council, the Chancellor, Treasurer, Lord Privy Seal, or any two of them, with a spiritual and a lay member of the Council, and with the addition of the two Chief Justices, or other two judges, to deal with cases of livery and maintenance, misconduct of sheriffs, and other specified offences against order. A later Act added the President of the Council, an office created in 1497, to this Court.<sup>1</sup>

The object and effect of this Act has been much discussed. Let us first look at the facts. The Council did not cease to exercise some criminal jurisdiction throughout the reign of Henry VIII, and in 1540 took power to compel those whom it summoned to enter into recognizances to attend its pleasure until they were dismissed, a power constantly exercised and, one must suppose, in a manner very irksome to the subject.<sup>2</sup> Among the Committees which Edward VI appointed, one was to deal with offences against order, the disregard of proclamations, and the infliction of the necessary punishments;<sup>3</sup> and during the reigns of Mary and Elizabeth we find the Council dealing with offences, mostly in the nature of seditious language, and ordering punishments.

Dr. Herbert, a secretary of the reign of Elizabeth, setting out his duties, records the distinction which existed between two branches of the work of the Council—matters of public interest, foreign or domestic, and matters between party and party. And of this second branch little is dealt with by the Lords of the Council, but in case of breaches of the peace 'the Lords do either punish the offender by commitment, or do refer the matter to be further proceeded in in the Star Chamber, where great riots and contempts are punished'.<sup>4</sup>

Thus side by side with this jurisdiction of the Privy Council we find existing another jurisdiction, that of the Lords of the

<sup>1</sup> 21 Hen. VIII, c. 20. This jurisdiction is recognized in 5 Eliz. c. 9, s. 7.

<sup>2</sup> Nicolas, vii. 27, and see *Acts of the Council*, ed. Dasent. Between April 1542 and the end of December 1546 no less than 158 such recognizances are recorded.

<sup>3</sup> Burnet, *History of Reformation*, v. 117. There were five Committees: one to deal with the civil, one with the criminal jurisdiction of the Council, others for the State, for the revenue and for the collection of debts due to the King, and for the bulwarks; Tanner, *Tudor Const. Doc.*, pp. 222, 223.

<sup>4</sup> Prothero, *Constitutional Documents*, p. 167; Tanner, p. 247 (1600).

Council sitting in the Star Chamber.<sup>1</sup> To this Court matters are constantly referred by the Privy Council in the reigns of Henry VIII, Edward VI, Mary, and Elizabeth; and when the Star Chamber is mentioned in the Acts of the Council, it is as the Court in which a case should be tried,<sup>2</sup> before which an individual should appear,<sup>3</sup> or a jury be censured.<sup>4</sup> Once there is a suggestion of jealousy on the part of the Council. Sir William Paulet, whose case had been deferred that he might formulate his charge, transferred it to the Star Chamber. The Council ordered that a matter brought before their table should not be removed to another Court without their authority, and required Paulet with all speed to exhibit his bill of complaint before them.<sup>5</sup> Thus, while we have two bodies, both of them exercising inquisitorial and judicial powers, we find that one makes only an occasional use of these powers, and is engaged mainly in administrative work. It remains to ask what distinction is to be found between Council and Star Chamber as regards jurisdiction, composition, or procedure.

One cannot suppose that the offences designated in the Act of Henry VII might not, apart from Statute, have been dealt with by the Council at large, or that, if they had been assigned to a Committee of the Council, the King might not have summoned two judges, not members of the Council, to assist the Committee. The Act did not create new offences, or a new jurisdiction, but it specified certain offences which the circumstances of the time had brought into prominence, entrusted certain persons with the exercise of a power which the Council had always possessed,<sup>6</sup> and legalized the disputed

<sup>1</sup> When Cranmer, on his first appearance before the Council, was ordered to appear before them on the following day at the Star Chamber, we seem to be on the point of identifying the two Courts. But the body which was present in the Star Chamber next day was a Committee of the Council 'appointed to sit upon the offenders'. It was not the Court of Star Chamber, for it transacted some administrative business, besides sending Cranmer to the Tower. See *Acts of the Privy Council*, iv. 347.

<sup>2</sup> *Acts of the Privy Council*, v. 71.

<sup>3</sup> *Ibid.* i. 386; iii. 41, 176, 216, 388; v. 193.

<sup>4</sup> *Ibid.* vi. 382, 411; vii. 347, 207. In this last case the jury was summoned from Cornwall for acquitting a man charged with piracy, in order that the matter might be heard in the Star Chamber on the first day of Term. Cf. *Floyd v. Barker* (1608), 12 Co. Rep. 23, 24.

<sup>5</sup> *Acts of the Privy Council*, vii. 405.

<sup>6</sup> Thus Bacon says: 'In the Star Chamber a sentence may be good

but efficacious procedure by writs of subpoena and Privy Seal, and examination on oath. Thus a stimulus and a definiteness were given to the exercise by the Council of a coercive jurisdiction which extended beyond the express provision of the Act.

And, though the jurisdiction thus exercised would seem to be that of the King's Council, there were differences in procedure; after 1487 the judges cease to be summoned to aid the Council in judicial work; the sittings of the Star Chamber were public, and were confined to the term time, and the evidence of those who came before the Court was given upon oath. When these differences arose it is not possible to say. Moreover, the persons who compose the Court are not the same as those who habitually sit at the Council Board. All contemporary authority on the subject of the Star Chamber points to the inclusion of men whose dignity or learning strengthens the Court, but who are outside the circle of habitual advisers of the Crown. It may perhaps be said that the Concilium Ordinarium is here discernible, for it is clear that the Star Chamber was a Council of the Crown, that it exercised a jurisdiction which the Privy Council might have exercised, but that it included persons whom the Privy Council did not include.<sup>1</sup> As a Council it could exercise the power of making Ordinances, and it thus regulated the censorship of the Press.<sup>2</sup>

In 1641 the Long Parliament passed an Act called 'an Act for the regulating the Privy Council and for taking away the grounded in part upon the authority given the Court by 3 Hen. VII, and in part upon that ancient authority which the Court hath by the Common Law'; *Works*, ed. Spedding, vii. 379. Cf. Hudson, *Star Chamber*, p. 10.

<sup>1</sup> Bacon describes the Court as compounded of four elements, Councillors, Peers, Prelates, and Chief Judges (*Works*, vi. 85.) Camden names certain great officers, as composing the Court, 'et omnes consiliarii status tam ecclesiastici quam laici, et ex baronibus illi quos princeps advocabit' (*Britannia* (ed. 1594), p. 112.) Sir Thomas Smith includes, in addition to 'the Lords and others of the Privy Council, as many as will, other Lords and Barons which be not of the Privy Council and which be in the town' (*Commonwealth of England*, bk. iii, ch. 4.) Crompton says: 'Le Court de Star Chamber est Hault Court, tenuis avant le Roy et son Conseil et auters.' (*Courts de la Roygne*, pp. 29, 35.) Finally, Hudson (p. 35) tells us that Lords of Parliament who were not members of the Privy Council claimed, and, in some cases, exercised, the right to sit and give judgment. This seems later to have ceased; Leadam, i, pp. xl, xli.

<sup>2</sup> Tanner, *Tudor Const. Doc.*, pp. 257, 279.

Court commonly called the Star Chamber'. In the preamble to this Act, the Star Chamber is assumed to be a Court of criminal jurisdiction created by the Act 3 Hen. VII, c. 1. It is asserted to have exceeded the powers conferred by that Act, and it is abolished. But the composition of the Court is suggested in the words which forbid 'any bishop, temporal lord, privy councillor, judge or justice whatsoever' to hear and determine any matter in the Court henceforth abolished. The Privy Council, or Council Board, is also forbidden to 'intermeddle in civil causes and suits of private interest between party and party'; and persons committed by the King in person or by order of the Council are to have a writ of *habeas corpus*.

The Long Parliament was historically wrong in tracing the origin of the Court of Star Chamber to the Act of Henry VII, but there can be no question that a distinction was drawn between the Star Chamber and the Privy Council as to their composition and as to the matters dealt with by the two Courts. With this enactment the judicial power of the King's Council acting as a Court of first instance within the jurisdiction of the Courts of law is brought to a close. It fell because it was felt to be a direct support of prerogative against Parliament, because it was a dangerous rival to the Courts of Common Law, and by its assistance to the Court of High Commission it was deeply disliked by the Puritans.<sup>1</sup>

#### § 4. THE CLOSER RELATIONS OF COUNCIL AND PARLIAMENT

The Commons had ceased, from 1422 onwards, to demand the nomination in Parliament of the King's Council. We do not know with certainty the time at which the Council ceased to be appointed for a year, and began to hold office during the King's pleasure; nor when they ceased to be paid for their services. Probably the Council of Regency which managed affairs in the minority of Henry VI set the example of an indefinite tenure of office; and the great lords who composed the later Lancastrian Councils were able to take care of themselves without payment.

From 1459 to 1621 there is no instance of an impeachment

<sup>1</sup> Holdsworth, *H.E.L.* i. 514. It was still popular under James I; Tanner, *Const. Doc. of James I*, pp. 140-5.

by the Commons; Parliament acts with the King in passing Acts of Attainder. It would seem as though they had altogether relaxed their hold on the executive.

And yet the connexion between Council and Parliament grew closer under the Tudors, who were in no way inclined to neglect legal forms, but preferred to adapt them to effect their ends in popular shape. In the House of Lords the dignity of the Council was enhanced by the 'Act for placing of the Lords'.<sup>1</sup> The Chancellor, the Treasurer, the President of the Council, the Lord Privy Seal, if peers, take place above the highest members of the peerage; the King's Secretary, if a bishop or a baron, sits above all other bishops or barons.

In the lower House the attempts to establish communications between the representatives of the Commons and the representatives of the Crown take different forms. Henry VIII used to require the Speaker<sup>2</sup> to be the exponent of his wishes, and on a few occasions ministers of the Crown who were not members of the Commons made unwelcome visits to the Commons House.<sup>3</sup> But from 1560 onwards the King's ministers, the Chancellor of the Exchequer and the Secretaries, are active in debate, and the Tudor practice of adding to the constituencies and tampering with the electorate was designed to secure seats for Court officials and nominees.<sup>4</sup> In 1614 the presence of Privy Councillors was noticed in the House of Commons, but, though their right to be present was discussed, it was not contested and was never afterwards disputed.<sup>5</sup> To admit members of the Council to discuss the King's business in the midst of them gave the Commons a surer mode of obtaining the control of affairs than the mere nomination of ministers in Parliament. We approach the modern connexion of executive and legislature, but it is by slow degrees. When the authors of the Grand Remonstrance, in 1641, asked that the King should only employ such councillors and ministers as could obtain the confidence of Parliament, they probably had no clear idea as to the mode in which that confidence should be expressed.

<sup>1</sup> 31 Hen. VIII, c. 10.

<sup>2</sup> Stubbs, *Lectures on Mediaeval and Modern History*, p. 272.

<sup>3</sup> In 1514 and 1523; *Parl. Hist.* i. 482-5.

<sup>4</sup> *Parl. Hist.* i. 1163.

<sup>5</sup> Tanner, *Tudor Const. Doc.*, pp. 519, 520.

At least, the presence of ministers in the House of Commons explaining their policy and the King's needs was a surer and more practicable mode of harmonizing legislature and executive than the use, however frequent, of the remedy by impeachment.

Impeachment was a valuable weapon when it was first instituted in the fourteenth century, and again when its practice was revived by the Commons in 1621 under kings who were ready to strain the Constitution to the point of rebellion. It was then important to be able to strike a heavy blow at the instruments of the royal will. But for the ordinary purposes of controlling or dismissing a careless, perverse, or incapable minister, the Commons, with no other means in their power than impeachment, were much in the position of an employer, who could not dismiss a useless or impertinent servant, but must wait till he was able to proceed by indictment for larceny or assault. The authors of the Grand Remonstrance said truly 'that the Commons might have cause often justly to take exceptions at some men for being counsellors and yet not charge those men with crimes'.<sup>1</sup> It was only by their presence in the House of Commons that ministers could be made to understand that they were indeed the servants of the King, but of the King as the official representative of the people.

## II. THE SUPERSESSION OF THE COUNCIL

### § 1. EVOLUTION OF THE CABINET

The Restoration did not give back to the Council the judicial powers which the Long Parliament had taken away. Duties, consultative and executive, still remained, and we now have to trace the supersession of the Council, as a consultative body, in favour of that group of confidential servants of the Crown which we know as the Cabinet.

The result of the contest between Charles I and his Parliament showed that the King could not govern except on amicable terms with Parliament, and as he must govern through ministers it would follow that these ministers must be acceptable to Parliament. This truth was not realized at

<sup>1</sup> Clarendon, *Rebellion*, bk. iv, s. 73.

once: Charles had bitterly contested it, and the process by which a correspondence of political opinion between ministers and the House of Commons has been secured was a slow one. But it began in the reign of Charles II.

We are used to see a group of ministers acting together on lines of policy approved by the majority of the House of Commons, under a leader whom we know as the Prime Minister, meeting for consultation in a body which we call the Cabinet, and holding office so long as their policy commands the confidence of Parliament and of the country. Each of these ministers is at the head of some branch of government—Foreign Affairs, the Army, Trade, Education—which he administers, subject in major issues to the Cabinet's control, with the aid of a large staff of permanent officials, and he represents this department, for purposes of explanation or defence, in the House of which he is a member.

Over against these ministers and their majority are the opposition leaders with the minority behind them, watching and waiting till the turn of public opinion gives them a majority and transfers to them the government of the country.

The Privy Council is therefore at the present time reduced, for ordinary purposes, to executive business which is formal and not discretionary, while its consultative functions have disappeared. But all Cabinet ministers are members of it.

In the reign of Charles II and for some time after we can see only the bare rudiments of such a scheme of government.

We find indeed a body of ministers, Privy Councillors, holding high offices of State, though not necessarily administrative offices,<sup>1</sup> meeting, with more or less regularity, for purposes of consultation. But, though one of these may enjoy a predominant influence with the sovereign, there is no recognized Prime Minister first in the royal confidence and entrusted with the choice of his colleagues; nor is there any necessary coherence of political opinion nor even any sense of personal loyalty among the groups of men who meet to discuss and settle the policy of the country. Neither government nor opposition in our sense yet exists.

<sup>1</sup> The President of the Council, the Lord Privy Seal, and the Lord Chamberlain were always in the inner circle of advisers. Their offices cannot be called administrative.

Moreover, with the exception of the Treasury and the Admiralty, the departments of government as we understand them do not exist. The duties of the Secretaries of State were divided in a manner so arbitrary<sup>1</sup> as to show clearly that neither was expected to administer any branch of our affairs, foreign or domestic. The Secretaries were, in those days, merely the channels through which the decisions of the King in Council were communicated to those concerned. Administrative business, including part of that of the Treasury and Admiralty, was carried on by Committees of the Council, or, if important, was prepared by them for submission to the full Council before action was taken.

To sketch the evolution of the Cabinet from the Council is not easy. That there was, during the reign of Charles II, and earlier, such an inner circle of advisers of the Crown is not difficult to show. In following out its history we have to trace the process by which the Cabinet becomes definite in composition, uniform in political opinion, collectively responsible for every act of Government. But, while the history of the Privy Council is recorded in the Registers of the Council, that of the Cabinet must be made out from casual notices in memoirs and correspondence. It is rare that we obtain any record of its transactions; it has varied in composition and numbers from time to time under the political conditions of the moment; and its relation to Parliament, and to the country, is undergoing constant, if imperceptible, change.

### *The Stuart Cabinets*

Neither an inner council nor the name 'Cabinet' were unknown in the time of Charles I. Sometimes the name is applied to a definitely constituted committee of the Privy Council, sometimes to a group of advisers enjoying the special confidence of the King. Thus, in the State papers of the early months of 1640, the Committee for Foreign Affairs is referred to as the 'Lords of the Junto',<sup>2</sup> the Committee for Scots Affairs as 'the Cabinet Council'. But in July 1640 we find

<sup>1</sup> One Secretary was responsible for communication with the Northern, the other with the Southern powers of Europe.

<sup>2</sup> *State Papers, Domestic*, 1639–40. See letters of 10 Jan., 7 Feb., 20 Feb., 5 Mar., 14 July.

the Lords of the Junto dealing with a question relating to the coinage, while a body of persons identical in composition with the Committee for Scots Affairs is described by Clarendon as ‘the Committee of State which was reproachfully after called the Juncto and enviously then in the Court the Cabinet Council’.<sup>1</sup>

It is extremely probable that where a Committee, set up for a particular purpose, was found to consist of persons who in a special manner commanded the confidence of the King, he used it for general consultation and advice. But where no system existed we may exert our ingenuity vainly in the endeavour to construct one.

The Commons, in the Grand Remonstrance, demanded that the King should employ such ministers ‘as Parliament may have cause to confide in’. A method by which the existence or withdrawal of their confidence might be shown was suggested in the words, ‘without which we cannot give his Majesty such supplies for the support of his own estate nor such assistance to the Protestant party beyond the sea, as is desired’.

The King in reply asserted his right to choose his ministers, and stated that he proposed always to employ persons of ability and integrity.<sup>2</sup>

In the reign of Charles II a change in the direction of modern practice begins. On the one hand the administrative and departmental duties of the Privy Council become more clearly defined: on the other the Cabinet, under that name, becomes a permanent, if somewhat indefinite and unacknowledged, feature of our institutions.

Throughout this reign the Committees of the Council were undergoing constant reorganization and change. At its commencement we find three standing Committees, for the Treasury, for Irish Affairs, and for Foreign Plantations; others were appointed from time to time for particular purposes. In 1667 there was an important rearrangement,<sup>3</sup> and the Committees (1) for Foreign Affairs, (2) for the Admiralty,

<sup>1</sup> Clarendon, *History of the Rebellion* (ed. Macray), ii. 99; Turner, *The Cabinet Council*, i. 310 ff.

<sup>2</sup> Gardiner, *Constitutional Documents*, pp. 153, 158.

<sup>3</sup> *Register of Privy Council*, Charles II, vii. 173.

(3) for Trade and Plantations, and (4) for Petitions of complaint and grievances are constituted with definite rules and duties. The Foreign Committee is so important during the next three reigns that it has been thought to contain the germ of the Cabinet;<sup>1</sup> but, though there were times when this Committee and the group of confidential advisers consisted of the same persons, the work of the Committee was in theory departmental, while that of the Cabinet was concerned with general policy.

This group of advisers appears at the beginning of the reign, but on a small scale. It was necessary that some communication should be maintained between the House of Commons and the King's ministers, because money was wanted; the sources of revenue assigned by Parliament to the King did not produce the sum contemplated,<sup>2</sup> and the funds needed would not be forthcoming unless a Parliamentary majority could be secured for a grant. To obtain this majority the ministers of Charles relied, not upon a community of political opinion with the Commons, but upon appeals to the loyalty, the good nature, or the self-interest of individual members.

How these appeals were to be made was settled in conference between Clarendon and Southampton, the Chancellor and Treasurer, and leading members of the House of Commons; these two ministers for a time advised Charles and determined the policy of the country. Soon, however, the King invited others to the conference, and appears to have himself dabbled in Parliamentary management, making promises without much regard to the prospect of their fulfilment.<sup>3</sup>

But, though one of the objects of this Committee was to obtain, by argument or inducement, the concurrence of a majority of the Commons with the wishes of the King, it does not satisfy our notion of a Cabinet. It was not a body of men who agreed on political questions, for Clarendon strongly resented the introduction of Ashley, Coventry, and Arlington to its consultations. The opinion of the majority did not bind the action of its members, for Clarendon and South-

<sup>1</sup> Turner, *The Cabinet Council*, i. 322 ff.

<sup>2</sup> *State Papers, Calendar of Treasury Books*, pp. xxviii, xxix.

<sup>3</sup> Clarendon, *Autobiography*, ii. 205.

ampton successfully opposed a Bill to enable the Crown to dispense with statutory requirements as to religious tests, though the Bill had been introduced into the House of Lords by Ashley with the approval of the King.<sup>1</sup>

The meetings of this body were, in Clarendon's time, informal in character, and uncertain in place; and, although general questions of policy were discussed, yet in grave matters of public interest, as, for instance, the sale of Dunkirk, the result of the discussion was laid before the full Council<sup>2</sup> for decision.

Certainly before the end of the reign the term 'Cabinet' was used for the groups of confidential servants who advised the King, and their meetings also attained a certain regularity. Political unanimity does not appear to have been necessary or expected. The Cabal was certainly not a harmonious body, yet Burnet speaks of a subject in 1673 as being 'much debated in the Cabinet'.<sup>3</sup>

The representative Privy Council of Sir William Temple's design, that transient and embarrassed phantom in our constitutional history, is interesting as showing how the need of reconciling the executive and the legislature was dimly felt in the seventeenth century, and how the problem puzzled the statesmen of the time.

The Government of Charles II had undergone a series of catastrophes; Clarendon had been impeached; the Cabal broke up in a storm of unpopularity; then again Danby was impeached. These violent ends of successive ministries led Charles II to invite Temple, a diplomatist of tried ability and integrity, to try to devise a ministry which should keep in touch with the House of Commons.

Temple proposed that a Council should be formed of thirty persons, chosen from the various political parties, and also containing representatives of the Church, the law, and the mercantile and landed interests. He believed that the representative character of this Council would commend it to Parliament, while the varied knowledge and experience of its members would make it an efficient adviser to the Crown.

<sup>1</sup> *Ibid.* 344-9.

<sup>2</sup> *Ibid.* 248.

<sup>3</sup> Burnet, *History of My Own Time*, ii. 8.

He forgot that, if his Council was thus to mirror the conflicting political opinions and the varied interests of the country, discussion would be lengthy and controversial, and that the obligation of secrecy would be extremely difficult to maintain. The advice tendered by such a Council was not likely to be harmonious, prompt, or confidential.

On 21 April 1679 Temple's scheme saw light, the King made a speech to the existing Council in which he thanked them for their services and discharged them from further attendance on the ground that their numbers made secrecy impossible, that he had been obliged, in consequence, to transact business with a smaller body of advisers, and that he wished henceforth 'to lay aside the use of *any single ministry, or private advice, or foreign committees*, for the general direction of his affairs'.<sup>1</sup>

But this Council followed the course of its predecessors. Three Committees were at once appointed, for Intelligence (virtually for Foreign Affairs), for Tangier, and for Trade and Plantations; Temple himself joined a small group which was formed for the discussion of general business, outside the Council, and was presently indignant because the King consulted another group in which he was not included.<sup>2</sup> In a year's time things went on as before.

Towards the close of the reign the Cabinet becomes a more definite institution. Lord Guilford had been given a place on Temple's Council as Lord Chief Justice of the Common Pleas. Not long afterwards he became Lord Keeper, and was summoned to meetings of the Cabinet. In Roger North's life of Guilford, the Council, the Committees of Council, and the Cabinet assume distinct shape.

The Council met every Thursday. The Lord Keeper attended these meetings, and also 'the Committees of Council, as for Trade and Plantations, &c., which might be called *English* business, but he never cared to attend at the Committee for Foreign Affairs, and yet, though he always declined giving any opinion in that branch of royal economy, he could

<sup>1</sup> *Registers of the Privy Council*, Charles II, vol. xv; Turner, *The Cabinet Council*, i. 342.

<sup>2</sup> *Temple's Works*, ii. 538, 541; Turner, vol. i, ch. iv.

not avoid being in the way of the ordinary deliberations of that kind by reason of his attendance at the said Councils'.

We see here the Committees preparing business for final discussion and settlement at the Council, which has evidently not yet lost its voice in the conduct of affairs.

But behind these is a body which is neither Committee nor Council. The Cabinet, we learn, met every Sunday. It consisted of 'those few great officers and courtiers whom the King relied on for the interior despatch of his affairs': who 'had the direction of most transactions of government, foreign and domestic'.<sup>1</sup> This was the body which settled questions of policy, and its work is plainly different from that of the Committees of Council.

### *The Cabinet of William III*

In the reign of William III the Cabinet becomes a recognized institution, though its importance is sometimes obscured by the strong will and political capacity of the King. An illustration of the complete independence of action, which William assumed in some departments of public affairs, is to be found in his correspondence with Pensionary Heinsius on the subject of the First Partition Treaty. His English ministers are never mentioned. Parliament is referred to from time to time as likely to give trouble about money and troops. The nation is described as inclined to peace, but 'if war is to be the upshot of this business I must take my measures to bring this nation insensibly into it'.<sup>2</sup> He speaks throughout of the movements of ships and troops, and the terms to be made with foreign powers, as matters for his own decision.

Evidently he desired to act for himself, or, if consultation was necessary, to consult with few. In fact, at the beginning of the reign, there are signs that he regarded the Cabinet as a formal, dignified body, whose advice would not be asked in matters of urgent importance.

This is suggested by the case of Sir Edward Seymour, who

<sup>1</sup> *Life of Lord Keeper Guilford*, by Roger North, pp. 227 ff. The narrative extends into the reign of James II; and we get another glimpse of the Cabinet of James. The East India Company's charter of 1687 received 'the approbation of the King declared in His Majesty's Cabinet Council'; Ilbert, *Government of India*, p. 22.

<sup>2</sup> *Hardwicke State Papers*, ii. 340, 347, 358, 362.

in 1692 accepted office as a junior Lord of the Treasury, and was sworn of the Privy Council. He claimed that his rank entitled him to sit above Hampden, the Chancellor of the Exchequer, at the Treasury Board. This was impossible, but his susceptibilities on the question of precedence were met by his admission to the Cabinet.<sup>1</sup>

The case of Lord Normanby, two years later, is interesting because it shows us William's views as to consultation with his ministers. Normanby was made a member of the Cabinet without office. He complained that, when the King was abroad, the Queen had held a meeting of ministers to which he was not summoned. The ministers summoned were the Lord President,<sup>2</sup> the Lord Keeper,<sup>3</sup> the Lord Privy Seal,<sup>4</sup> the Master of the Ordnance,<sup>5</sup> and the two Secretaries of State.<sup>6</sup> The business concerned the service of the fleet in the Mediterranean and off the coast of France. Normanby was not satisfied by the assurance that this was not a Cabinet Council. Shrewsbury wrote to William on the subject, and the reply is instructive:

'It is true that I did promise my Lord Normanby that when there was a Cabinet Council he should assist at it: but surely this does not engage either the queen or myself to summon him to all the meetings which we may order, on particular occasions, to be attended solely by the great officers of the Crown, namely, the lord keeper, the lord president, the lord privy seal, and the two secretaries of State. I do not know why Lord Sydney was summoned to attend unless it was on account of some business relative to the artillery, which, however, might have been communicated to him. I do not see that any objection can be made to this arrangement, whenever the queen summons the aforesaid officers of the Crown to consult on some secret and important affair. Assuredly that number is fully sufficient, and the meeting cannot be considered as a Cabinet Council since they are distinguished by their offices from the other counsellors of State, and therefore no one can find fault if they are more trusted and employed than the others.'<sup>7</sup>

<sup>1</sup> Luttrell's *Diary*, ii. 472, 485, 490.

<sup>2</sup> Carmarthen. It is not clear whether Portland or Carmarthen or both were present.      <sup>3</sup> Somers.      <sup>4</sup> Pembroke.      <sup>5</sup> Sidney.

<sup>6</sup> Shrewsbury and Trenchard.

<sup>7</sup> Shrewsbury Correspondence (Coxe), pp. 34, 38. For other Cabinets with varying members present, see Turner, *The Cabinet Council*, i. 402-5.

William appears to hold that a place in the Cabinet might be given as a compliment to a Privy Councillor, but that 'secret and important affairs' are not for the Cabinet but for a few great officers<sup>1</sup> whom the Crown may please to consult. There is not only no sense of the collective responsibility of the Cabinet or of this inner group; there is hardly any sense of the individual responsibility of those who may be 'trusted and employed above others'.

An interesting light is thrown on the practice of the time in this respect by the minutes which Shrewsbury kept of Cabinet meetings held in the years 1694, 1695, 1697. About sixty such meetings are recorded in the Montagu House papers, and are there described as 'Privy Council Minutes'. They are clearly Cabinet minutes kept by Shrewsbury for his own information, as may be seen if they are compared one by one with the official records of meetings of the Privy Council during that period.<sup>2</sup>

The persons present at the Cabinet vary but slightly from one meeting to another. The President of the Council, the Lord Keeper, the Lord Privy Seal, the two Secretaries of State, Godolphin and Russell representing the Treasury and the Admiralty, form a nucleus. The Archbishop becomes a regular attendant from the date of Tenison's appointment. The Master of the Ordnance, the Lord Steward, the Lord Chamberlain appear less frequently. It is possible to identify the meeting held on 14 May 1694<sup>3</sup> as the meeting which was the cause of offence to Normanby, because he was not summoned. He is present at the next recorded meeting but one,<sup>4</sup>

<sup>1</sup> On 9 May 1694 there was a meeting of the five officers only to discuss the secret issue of an attack on Brest; Turner, i. 161.

<sup>2</sup> Hist. MSS. Commission, *Montagu House Papers*, vol. ii, part i. Meetings are recorded on fifty-nine days. On one of these, 4 May 1695, the Cabinet met apparently six times. A comparison of these minutes with the Register of the Privy Council shows that on forty-seven of these days no Council was held. On the occasions when a Council was held on the same day as one of the meetings recorded by Shrewsbury, the persons, the business, and sometimes the place differ; except on one occasion, 9 Dec. 1694, when his minute is clearly a note of special business, which, as we can learn from the Register, was assigned to Shrewsbury at a meeting of the Privy Council. See Turner, *The Cabinet Council*, vol. i, ch. vii.

<sup>3</sup> Hist. MSS. Commission, *Montagu House Papers*, vol. ii, part i, p. 66.

<sup>4</sup> At a meeting of 16 July 1694 the Lord Keeper and the two Secretaries alone were present; on 26 July Normanby was present; Turner, i. 162.

the minutes of which are significantly endorsed by Shrewsbury as 'Cabinet Council'. The name of Seymour does not often appear. Evidently there was an outer and an inner circle of the Cabinet. Normanby, by his importunity, forced his way into this inner circle: but others, less exacting, were less frequently summoned.

Sunderland had more definite views as to the Cabinet, and these were shared, as we shall see later, by Bolingbroke.<sup>1</sup>

In 1701<sup>2</sup> he writes to Somers as to the conduct of affairs in the event of a Whig majority being returned at the general election then pending. Among other things he proposes:

'None to be of the Cabinet but those who have in some sort a right to enter there by their employment.'

'Archbishop, Lord Keeper, Lord President, Lord Privy Seal, Lord Steward, Lord Chamberlain, First Lord of the Treasury, and two Secretaries of State. The Lord Lieutenant of Ireland must be there when in England. If the king would have more it should be the First Commissioner of the Admiralty, and the Master General of his Ordnance.'

*'It would be much for the king's service if he brought his affairs to be debated at that Council.'*

Three things are noticeable in this passage: the clear conception of a Cabinet Council at which affairs of general policy should be discussed; the disinclination of the King to use such a Council; and the small regard paid to the representation in the Cabinet of the holders of great administrative offices—William had thought that the Master of the Ordnance should take his orders without being consulted. Sunderland thinks that he might possibly be admitted into a Cabinet which necessarily should contain the Archbishop, the Lord Chamberlain, and the Lord Privy Seal.

## § 2. THE CABINET AND THE COMMONS

### *Relations under William III*

At this point it is necessary to turn from the evolution of the Cabinet and its relations with the King to the question of ministerial responsibility to Parliament as affected by the

<sup>1</sup> *Infra*, p. 105.

<sup>2</sup> *Hardwicke State Papers*, ii. 461.

existence of the Cabinet. Responsibility to Parliament was imperfectly understood, although from the reign of Edward III onwards attempts had been made to secure it. Legal responsibility only exists if it can be enforced; it can only be enforced by some form of penalty; and a convenient form of penalty was not as yet discovered.

For the King, whether he loved pleasure like Charles II, or religion like James II, or power like William III, wanted to direct his government to the ends he desired, and, if he found ministers in whom he had confidence, he was not disposed to change them because his confidence was not shared by the House of Commons. He had to learn that, inasmuch as the needs of State outran the resources placed at the disposal of the Crown, he could only govern through men able and willing to induce the Commons to supplement those revenues by additional supplies.

The Commons were prepared to assume that the acts of the Government were the acts of the King's ministers, not of the King himself: but they wanted to be able to punish an erring minister if they could be sure of punishing the right man.

The punishment was clumsy enough—impeachment or attainder resulting in exile, imprisonment, fine, or death—until it came to be understood that the expression of popular disapproval, shown by a vote of the House of Commons or the result of a general election, was a sign that the entire Ministry must be changed or that a minister who had acted on his own responsibility must leave office.

But the difficulty of the time was not merely to find the right punishment, but to fix responsibility on the right persons.

Some part of this difficulty, as in the case of William III, might arise from the independent action of the King, and some from the absence of any notion of a ministry acting as a whole; but a great deal was due to a state of things which we can hardly realize, the want of government departments working under responsible political chiefs.

If, at the present day, the public, through the House of Commons, has reason to complain of the condition of the Navy, the conduct of Irish affairs, the administration of the

Post Office or War Office,<sup>1</sup> there is a minister directly responsible for each of these departments who can be called to account. If his action has been approved by the Cabinet, the Ministry must stand or fall by the decision of the Commons. If he has acted on his own responsibility, his colleagues may, or may not, defend him, and he may be compelled to resign. But departmental business, at the date of the Act of Settlement, was largely transacted through Committees of the Privy Council. Thus individual responsibility was lost while the Cabinet recognized no collective responsibility.

The difficulty which might arise from the independent action of the King is illustrated by the incidents of the First Partition Treaty:<sup>2</sup> William conducted the negotiations in Holland, but he could not conclude a treaty without formalities which needed the use of the Great Seal, and this again needed a sign manual warrant with the counter-signature of a Secretary of State.

Portland, therefore, our ambassador at Paris, was directed to communicate the terms of the treaty to Vernon, for the information of Somers: and the King himself wrote to Somers desiring him to consult such of his colleagues as he thought proper to be admitted to the secret, and asking that the necessary forms should be sent to him without letting their purport be known to any but these few favoured Counsellors.

Somers had interviews with Vernon and Montagu, communicated by letter with Oxford and Shrewsbury, and, with Vernon, sent the necessary powers to the King, adding some words of warning. Later he obtained a formal warrant to cover his action.

In the case of the Second Partition Treaty Jersey tried to obtain the Seal irregularly from Somers, but had to produce a warrant.

In 1701 Somers was charged, on his impeachment, with his conduct in respect of the Partition Treaty. He answered that he had affixed the Great Seal on the authority of a sign manual warrant, countersigned by a Secretary of State; that

<sup>1</sup> Cf. the fall of Rosebery's Government in 1895 as the result of a snap vote on the issue of the stores of cordite (21 June); Oxford, *Fifty Years of Parliament*, i. 231, 232.

<sup>2</sup> Thomson, *Secretaries of State, 1681-1782*, pp. 9, 10.

he had offered an opinion about the treaty, but was not responsible for its terms; and that he had acted as the King bade him. Portland also alleged that he had informed Somers, Vernon, Halifax (First Lord of the Treasury), the Lord Privy Seal, Marlborough, and the Vice-Chamberlain of the Household; but no attention was paid to their suggestions.<sup>1</sup>

To us it would seem that Somers should either have refused to affix the seal to the powers needed for making the treaty, or else that he should have accepted responsibility for its terms. To us it seems surprising that the King should not have submitted the result of these important negotiations to his entire Cabinet, and that Somers after a perfunctory consultation with four of his colleagues should have supplied the King with powers in blank and pleaded the King's commands as relieving him from all responsibility.

But this only illustrates one side of the difficulties of the time—Somers was at any rate an ascertainable person, in charge of the Great Seal, for the use of which he might be called to account. The Cabinet was a more elusive body. At the close of 1692 there was an interesting debate in the House of Commons on the cost and ill success of the war, on our losses at sea, and on the advice to be given to the King. The House resolved that 'the great affairs of Government had been for some time past unsuccessfully managed under those that had the direction thereof', and asked their majesties to prevent this by employing 'men of known integrity and ability'. But in the course of debate it was asked how the House could ascertain who were in fault. One speaker says, 'I know not where we are wounded. I would not have the management in such hands in the future; but this cannot be while we have a Cabinet Council.' Another says, 'The method is this; things are concerted in the Cabinet and then brought to the Council: such a thing being resolved in the Cabinet and put upon them, for their assent, without showing any of the reasons.' He goes on to say that this practice has given dissatisfaction at the Council, and adds, 'If this method be, you will never know who gives advice.'<sup>2</sup>

A third, almost in the language of the Act of Settlement,

<sup>1</sup> Burnet, *History of My Own Time*, iv. 469, 470.

<sup>2</sup> *Parl. Hist.* v. 731.

says, 'I would have every Counsellor set his hand to his assent, or dissent, to be distinguished.'

The debate ended with a resolution which would now be regarded as a vote of censure on a ministry; it had no such effect as would now follow from such a vote.

A recognition of the need of varying the composition of a ministry, as the balance of parties shifted, would not of itself meet the complaint of the speakers quoted above. Nor would the substitution of the Privy Council for the Cabinet have given the House of Commons the opportunity which it desired for attacking incompetent management in the various departments of government.

The framers of the Act of Settlement did not see the whole difficulty, and failed to find a remedy for what they did see.

What was needed was the responsibility of individuals for specific branches of State affairs, and of these individuals as a body for the action of one another and the policy of the whole: so that, when a department was ill conducted or general policy disapproved, the minister who was to blame or the entire ministry should lose place and power. It was not necessary in the public interest that they should be banished or sent to prison or lose their heads. But the Commons of that day could not forecast the mode in which the constitution would work out, nor conjecture the ultimate practical solution of their difficulties.

In the first instance the treatment of this question was embarrassed by the fear lest the representatives of the people themselves, who should stand forth as the accusers of those who did wrong or gave evil advice in high places, might themselves be infected by the presence of persons holding office under the Crown, and thereby incapacitated from judging fairly when the interests of King and people seemed to conflict.

This fear so far prevailed that a provision was introduced into the Act of Settlement excluding persons holding office under the Crown from sitting in the House of Commons. Had not this provision been repealed in 1705 before the Act came into operation the Commons would doubtless have lost power as against the Lords, since ministers debarred from

the former House would naturally have been present in the other.

The endeavour to ensure that ministers should be accountable for the advice which they gave was embodied in another provision.

'From and after the time that the further limitations by this Act shall take effect, all matters and things relating to the well governing of this kingdom which are properly cognizable in the Privy Council by the laws and customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same.'

The proposal was clearly unsound. As the experiment of 1679 showed, the Privy Council, unless reduced in number, and reconstituted from time to time, so as to secure some community of political opinion among its members, would have proved an unworkable machine for the purposes of government. The requirement of a signature would often have failed to identify the real culprit, because the policy recommended may have been sound, but marred by departmental inefficiency.

Burnet<sup>1</sup> says that 'it was visible that no man would be a Privy Councillor on those terms'. It must have been equally visible that no Privy Council could conduct the business of State under the proposed conditions.

One more precaution taken in the Act of Settlement is to be found in the provision that:

'No pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.'

The case of Danby was in the minds of those who framed this provision. Such a case would arise if the various officers of State responsible for the formalities necessary to the use of the Great Seal were ready to assist the King to exercise the prerogative of mercy, not to pardon a criminal tried and sentenced, but to prevent the question of criminality from being tried.

<sup>1</sup> *History of My Own Time*, v. 24.

It might also arise in the case of so scandalous a breach of duty as was committed by Lord Chancellor Nottingham in the case of Danby. Charles II sent for Nottingham desiring him to bring the Great Seal. The Chancellor came, with the Great Seal in charge of an attendant. Danby produced a pardon, which the King signed, and then took the Seal from Nottingham and ordered the attendant to affix it to the pardon.<sup>1</sup> The act was a direct breach of Statute Law governing the use of the Seal, and Nottingham, by taking the Seal back from the King's hands, made himself a party to this illegality. No doubt he deserved impeachment as much as Danby. But the provision of the Act of Settlement was in fact out of date. No King since the Revolution has made, or would be likely to make, himself responsible for an act which the Commons considered deserving of impeachment, by thus using his prerogative of pardon.

The framers of the Act of Settlement, with the best intentions, did nothing to bring about that responsibility of ministers to Parliament with which they were so much concerned. Their work is interesting only as showing that they realized a difficulty which custom and the instincts of practical convenience have gradually brought to a solution.

### *The Cabinets of Anne*

In the reign of Anne, Cabinet and Council are more distinct than in the days of William III, but we still find three consultative bodies under various titles, (1) the Cabinet, or Lords of the Cabinet Council, (2) the Lords of the Committee or the Committee of Council, (3) and the Privy Council or Great Council; the three bodies which had demanded, in different degrees, the attention of Lord Keeper Guilford. The relation of the first two of these bodies is obscure and much disputed. It has been conjectured<sup>2</sup> that the distinction lies in the presence of the Crown at the former; when the Crown was absent the body is a Committee of the Cabinet Council. But the Queen appears at sessions of both bodies, and it is also easy to identify them simply.<sup>3</sup> Yet in some cases a measure of dis-

<sup>1</sup> *Journals of the House of Commons*, ix. 575.

<sup>2</sup> W. Michael, *Englische Geschichte*, i. 440.

<sup>3</sup> Turner, *The Cabinet Council*, i. 344-94.

tinction is visible, and in these instances the Cabinet determines policy; the Committee of Council does the work which to-day is done by the departments of government; the Council gives formal expression to the royal will. Probably the tendency was developing to restrict the royal presence to meetings styled Cabinets. In the reign of Anne the Foreign Committee assumes an importance disproportionate to that of others, but this may be because we learn the workings of the machine chiefly from the letters of Bolingbroke who was largely concerned with the business of that Committee.<sup>1</sup> In his correspondence we see the Cabinet which settled questions of general policy sitting in the presence of the Queen; the Lords of the Committee or Lords of the Council, who worked through the details of the Treaty of Utrecht; the Privy Council, who gave their formal assent to the treaty and authority to affix the Great Seal to its ratification.

Thus in the framing of the Treaty of Peace and Commerce with Spain, Bolingbroke informs the Queen that 'the draft will be ready for the Lords of the Council to-morrow, and for the Cabinet on Sunday, when I presume you would have the Council sit as usual'.<sup>2</sup> Again, five days later he announces that the Lords of the Council have gone through half the treaty and expect to finish it the next day: 'my Lord President will take care to summon the Great Council, pursuant to your Majesty's commands, for Thursday morning'.<sup>3</sup>

Three points come out in the history of the Cabinet during this reign.

The first of these is the closer connexion of the Cabinet with the departments of government. Sunderland in the previous reign regarded the First Lord of the Admiralty and Master of the Ordnance as persons who might or might not be in the Cabinet. But nine years later Bolingbroke speaks of the first office as necessarily bringing the holder into the Cabinet, but not the second: 'The employment of First Com-

<sup>1</sup> Bolingbroke, *Letters*, i. 167: 'I have not been, to own the truth to your Grace, this month, at the Committee of Lords which sits at the War Office.' There appears to have been a Committee to examine Guiscard in Newgate, *Letters*, i. 102. The assembly before whom he appeared when he stabbed Harley would seem to be the Cabinet; see Swift, *Narrative of Guiscard's Examination*; but it is also styled Committee; Turner, i. 377-80, 385, 426.

<sup>2</sup> 24 Sept. 1713.

<sup>3</sup> 29 Sept. 1713.

missioner of the Admiralty brings your Lordship (Strafford) into the Cabinet, which would not have been if the other employment (Master of the Ordnance) had fallen to your share, without making a precedent for enlarging the Cabinet, which Her Majesty had much rather confine than extend.'<sup>1</sup>

Shrewsbury, writing to Harley, speaks in the same way of the Treasury Commission. 'In my mind you should be at the head, because you then come naturally into the Cabinet Council where you are much wanted.'<sup>2</sup>

The second point is that, although we may note a tendency to connect the Cabinet more closely with actual administration, the want of political chiefs responsible for particular departments is obviously felt by Parliament.

In January 1711 a debate arose in the Lords on the conduct of the war in Spain, and a resolution amounting to censure of 'the Cabinet Council' was moved, together with an address to the Queen that she would 'be pleased to give leave to any Lord, or other, of her Cabinet Council, to communicate to the House any paper or letter relating to the affairs of Spain'. The Queen gave the permission asked for, and came down '*incognito* to hear the debate'.<sup>3</sup> The resolution was then moved, with the substitution of 'ministers' for 'Cabinet Council'. Upon this there ensued a long wrangle as to the greater or less precision of the substituted words. Lord Rochester stated emphatically that the Queen was not responsible, 'that according to the fundamental constitution of this kingdom Ministers are responsible for all'. But this did not help the object of the debate, which really was to pass a censure on some definite person or group of persons. It was urged with truth that 'ministers' was a word of uncertain signification, and might include persons who had no part in the policy which misdirected the war in Spain: while 'Cabinet Council' was a 'word unknown in our law', and if a censure was passed the House ought to know whom they were censuring. The truth was that there was neither collective responsibility for policy, nor individual responsibility for departmental inefficiency. A vote of censure had no

<sup>1</sup> Bolingbroke, *Letters*, iii. 27.

<sup>2</sup> Hist. Manuscripts Commission, MSS. of Marquis of Bath, i. 198.

<sup>3</sup> *Parl. Hist.* vi. 971.

terrors for a Cabinet which had no sense of corporate existence, and, when either House tried to ascertain more precisely the cause of a trouble, responsibility disappeared in a Committee of the Privy Council.

Thirdly, the Great Council, that is, the Privy Council, has now been reduced to formal executive action. In this respect its position had manifestly changed in thirty years, as may be seen by comparing the meeting to approve the sale of Dunkirk with the meeting to sanction the peace of Utrecht. The sale of Dunkirk was debated at length at the Council Board, though it had already been fully discussed at the Cabinet or Committee, and Clarendon mentions with satisfaction that there was but one dissentient voice.<sup>1</sup> When the Treaties of Peace and Commerce were laid before the Privy Council in 1713, and the Queen proposed their ratification, Lord Cholmondeley suggested a postponement for further consideration, but he was told that the time for exchanging ratifications was settled, and was so near at hand that no postponement was possible. The treaties thereupon passed the Council, and next day Lord Cholmondeley was deprived of his place in the Queen's Household.<sup>2</sup>

On one celebrated occasion the Privy Council resumed the functions of a Cabinet. The meeting at Kensington, when Anne lay dying, was a meeting of the Council, and is so recorded in the Register; and their Lordships, 'considering the present exigency of affairs, were unanimously of an opinion to move the Queen that she would constitute the Duke of Shrewsbury Lord Treasurer'.<sup>3</sup>

Having ascertained that the Queen was in a condition to be spoken to, the wish of the Council was communicated to her by certain members of the Board. Shrewsbury was summoned to receive the staff of office, and on his return measures were taken for the security of the kingdom against a possible surprise by the adherents of the Stuarts.

This is, if not the last, at any rate a very exceptional exer-

<sup>1</sup> Clarendon, *Autobiography*, ii. 248.

<sup>2</sup> *Parl. Hist.* vi. 1170; Swift's *Journal*, 7 and 8 Apr. 1713.

<sup>3</sup> *Register of the Council*, 30 July 1714; G. M. Trevelyan, *England under Queen Anne*, iii. 308 f. The Dukes of Argyll and Somerset entered the Council unsummoned, an action not repeated until 11 Dec. 1916, when Lord Milner was inadvertently present, *Fitzroy, Memoirs*, ii. 641.

cise by the Privy Council of deliberative as well as executive powers. From the date of the Revolution we may say that the Cabinet became the motive power in the Executive of the country.

### III. THE CABINET

#### § 1. THE COUNCIL AND THE CABINET

The accession of George I marks the beginning of Cabinet government as we understand the term. The King had hitherto recognized the predominance of a party, as affecting his choice of ministers, only when circumstances put constraint upon him. The natural inclination of a Sovereign would be to choose ministers on grounds of individual merit rather than of party politics; but we have seen how William III and Anne gradually, sometimes reluctantly, shaped their ministries to correspond with the balance of parties in Parliament. George I, however, from the outset, and of necessity, placed his confidence in the leaders of the party which secured his accession; the party which by reason of the quicker intelligence and better organization of its members, rather than by its numerical superiority in the country, was able to keep him on the throne. There was no question of playing off one party against another, or selecting the best men from both sides. The Ministry of George I was necessarily Whig.

And George I soon ceased to preside at Cabinet meetings. The effect of this was twofold; the King lost initiative and control in discussing and settling the policy of the country; and, as some one must preside at these meetings, the place hitherto occupied by the King was taken by a minister: the Prime Minister becomes a more definite person than heretofore.

Thus, in the words of Lord Acton, ‘Government by party was established in 1714, by party acting by Cabinet’, and ‘the power of governing the country was practically transferred. It was shared, not between the minister and the King, but between the head of the ministry and the head of the opposition.’<sup>1</sup> The latter statement is perhaps an anticipation, for organized opposition hardly existed before the time of Burke, but this great change of 1714 is clearly marked; and here we may finally distinguish the functions of Cabinet and Council.

<sup>1</sup> Acton, *Lectures on Modern History*: ‘The Hanoverian Settlement’.

The Cabinet are 'His Majesty's servants'. The Privy Council are 'the Lords and others of His Majesty's most Honourable Privy Council'. To describe the Cabinet as a Committee of the Privy Council is misleading. Every meeting of the Privy Council from which the King is absent is a Committee, even if every member should be summoned and present.<sup>1</sup> But the Cabinet does not meet as a Committee of the Privy Council, for it is not so constituted. The Cabinet meets for the purpose of advising the Crown, and, as its members are not otherwise bound by any obligation of secrecy, it would seem that to be sworn of the Privy Council is a necessary prelude to admission to the Cabinet.<sup>2</sup> The Cabinet considers and determines how the King's Government may best be carried on in all its important departments; the Privy Council meets to carry into effect advice given to the King by the Cabinet or by a minister, or to discharge duties cast upon it by custom or statute. Committees of the Council meet to act or advise on specified matters. It is necessary that a member of the Cabinet should be under the obligations of a Privy Councillor, because the oath of the Privy Councillor assumes that he is a confidential adviser of the Crown.

But the Privy Council is essentially an executive, the Cabinet, a deliberative body. The policy settled in the Cabinet is carried out by Orders in Council, or by action taken in the various departments of government. Committees of the Council may be appointed to collect evidence, to report and advise on certain matters, but the Cabinet meets to advise and initiate action in all matters; its members are the heads of executive departments, and leaders of the party whose policy is approved by the electorate, and so the advice of the Cabinet is acted upon.

The two bodies are differently summoned.

<sup>1</sup> This idea belongs only to the eighteenth century, second half; Turner, *The Cabinet Council*, i. 358, 359.

<sup>2</sup> Hearn (*Government of England*, p. 192) says that Lord Bute was made a member of the Cabinet by George III before he was Privy Councillor, but this seems to be a misunderstanding of a note to Walpole's *Memoirs*, i. 8. George II died on the morning of Saturday, 25 Oct. Lord Bute was sworn of the Privy Council on Monday the 27th (Haydn's *Book of Dignities*, 2nd ed. p. 200). Horace Walpole, writing to Mann on the 28th, says, 'the Duke of York and Lord Bute are named of the Cabinet Council' (*Letters*, iii. 354). But see *post*, p. 123.

A summons to the Cabinet runs thus:

'A meeting of His Majesty's servants will be held at the<sup>1</sup> — at — o'clock on Saturday, the — of May, at which — is desired to attend.'

A summons to a Council at which the King will be present is in the following form:

'Let the messenger acquaint the Lords and others of His Majesty's most Honourable Privy Council, that a Council is appointed to meet at the Court at —<sup>2</sup> on — the — day of this instant, at — of the clock.'

When the King will not be present the form is as follows:

'Let the messenger acquaint the Lords of His Majesty's most Honourable Privy Council, that a Committee of their Lordships is appointed to meet in the Council Chamber, Whitehall, on — the — of — at — of the clock.'

Nor is it only in the form of the summons that the difference lies. The Cabinet is summoned by the Prime Minister, formerly through his private secretary, but since 1916 through the official Secretary to the Cabinet. The Privy Council is summoned by the Clerk of the Council, an officer whose history dates back to 1540, when Sir William Paget, himself afterwards a Privy Councillor and Secretary of State, was appointed Clerk<sup>3</sup> to the side of the Council in attendance on the King.

The Cabinet of the present day is then a body distinct from the Privy Council in title, in function, and in mode of summons. Every member of the Cabinet is a Privy Councillor, and the connecting link between the two bodies may be found in the Privy Councillor's oath and the obligations which it involves.

## § 2. COLLECTIVE RESPONSIBILITY OF THE CABINET

The Cabinet, as a whole, is responsible for the acts of its members: but if this responsibility is to be real the Cabinet

<sup>1</sup> The place of meeting varies with circumstances; it might be at the Prime Minister's official residence, in Downing Street, or in his private room at Westminster. Meetings at the Foreign Office are now rare.

<sup>2</sup> The place of meeting is not rigorously defined; the King in 1903 held a Council at Lord Londonderry's house at Wynyard; A. Fitzroy, *Memoirs*, i. 161. The King may authorize the holding of a Council on his behalf out of the United Kingdom, e.g. by the Duke of Cornwall in Australia; *ibid.* i. 48; cf. 58 f.

<sup>3</sup> Nicholas, *Proceedings of the Privy Council*, vii, pp. ii, 4. For Clerks of the earlier Councils, see Baldwin, *The King's Council*, pp. 362-8, 449 ff. The Clerk of the Council is also now Secretary to the Cabinet.

must be a definite body of persons, every one of whom is informed, or can obtain information, as to any measure of importance contemplated or taken by the entire Cabinet, or by any individual member.

Throughout the greater part of the eighteenth century this collective responsibility did not exist. The Cabinet was a large body meeting occasionally for the formal settlement of business which had been practically settled by a small inner group, 'the confidential Cabinet'.

The first Cabinet of George I contained in its fifteen members the Duke of Marlborough, who was scarcely ever invited to Cabinets of which he was a nominal member; and Lord Somers, whose infirmities prevented him from taking any part in public business.<sup>1</sup>

In the reign of George II we have two complete lists<sup>2</sup> of

<sup>1</sup> Stanhope, *History of England*, i. 104; Turner, *The Cabinet Council*, i. 408

<sup>2</sup> *List of Cabinet*, 9 Sept. 1737: *List of Cabinet*, 1740:

1. Archbishop of Canterbury.	1. Dr. Potter (Archbishop of Canterbury).
2. Lord Chancellor.	2. Lord Hardwicke (Lord Chancellor)
3. Lord Godolphin (Lord Privy Seal).	3. Earl of Wilmington (Lord President).
4. Duke of Grafton (Lord Chamberlain).	4. Lord Hervey (Lord Privy Seal).
5. Duke of Richmond (Master of the Horse).	5. Duke of Dorset (Lord Steward).
6. Duke of Newcastle.	6. Duke of Grafton (Lord Chamberlain).
7. Earl of Pembroke (Groom of the Stole).	7. Duke of Richmond (Master of the Horse).
8. Earl of Islay.	8. Duke of Devonshire (Lord Lieutenant of Ireland).
9. Lord Harrington.	9. Duke of Newcastle (Secretary of State).
10. Sir R. Walpole.	10. Earl of Pembroke (Groom of the Stole).
11. Sir C. Wager	11. Earl of Islay (First Minister for Scotland).
12. Duke of Devonshire.	12. Lord Harrington (Secretary of State).
13. Duke of Dorset.	13. Sir Robert Walpole (Chancellor of Exchequer).
14. Duke of Argyle.	14. Sir C. Wager (First Commissioner of the Admiralty).

*Life of Lord Hardwicke*, i. 383.

There were subsequently added to these, Sir John Norris, the Duke of Montagu (Master of the Ordnance), and the Duke of Bolton. 'The Duke of Bolton, without a right to it from his office of Captain of the Band of Pensioners, in which employment he succeeded the Duke of Montagu on

the Cabinet for the years 1737 and 1740; the one contains sixteen, the other fourteen names, and to this last three were subsequently added. The Archbishop of Canterbury, the Lord Chamberlain, the Groom of the Stole, and the Master of the Horse appear in each. Both Lord Hardwicke and Lord Hervey, who furnish these accounts, describe a smaller group—Walpole, the two Secretaries of State, and the Chancellor—meeting for the discussion and virtual settlement of policy. The formality, amounting to futility, of the meetings of the whole Cabinet Council is apparent in these memoirs. The business generally consisted in the verbal revision of some document, important no doubt, the purport of which had been settled by the confidential servants of the King.<sup>1</sup>

In 1754, when Henry Pelham died, the King was anxious to get the advice of the entire Cabinet as to the future conduct of public business, but the matter was practically settled by Hardwicke and Newcastle. The former wrote to the Archbishop to obtain his opinion, or rather to tell him what his opinion was desired to be; he informed the Archbishop that he need not attend personally, but must answer at once. A draft of the answer required was sent with the letter.<sup>2</sup>

The Archbishop replied as he was instructed. The Cabinet met, and the King was advised to make the Duke of Newcastle First Lord of the Treasury, and virtually Prime Minister.

When George III came to the throne the number of titular Cabinet Councillors excited the mirth of Horace Walpole. The Duke of Leeds was removed from the Cofferer's place and made Justice in Eyre, 'but to break the fall, the Duke is made Cabinet Councillor, a rank that will soon become indistinct from Privy Councillor by growing as numerous'.<sup>3</sup>

But these men took no part in the decision of policy. In the Grenville Ministry, which lasted from the spring of 1763 to the summer of 1765, the business of government was settled

his removal to the Ordnance, was likewise admitted to the Cabinet Council, because he had been of it seven years ago, at the time he was turned out of all his employments; *Hervey Memoirs*, ii. 551.

<sup>1</sup> *Hervey Memoirs*, ii. 556–71.

<sup>2</sup> *Life of Lord Hardwicke*, ii. 512, 515, 516.

<sup>3</sup> *Walpole Letters*, iii. 384 or v. 36 (ed. Toynbee). A few days later he writes, 'Lord Hardwicke is to be Poet Laureate, and according to usage I suppose it will be made a Cabinet Counsellor's place' (*ibid.* 386 or v. 40).

at weekly dinners at which only five or six ministers were present. The Cabinet minutes record 'meetings of his Majesty's servants' attended only by Grenville, the First Lord of the Treasury, the two Secretaries of State, the President of the Council, and the Chancellor: sometimes this body is reinforced by Lord Mansfield, the Chief Justice.<sup>1</sup> It is not easy to suppose that the number of honorary members of the Cabinet had diminished between 1760 and 1763, and there is other evidence to show that the Cabinet ministers were of two sorts, efficient and honorary.<sup>2</sup>

The distinction between the two groups was marked by the communication of important State papers to the 'efficient' ministers, who had therefore Cabinet keys for the boxes in which papers were circulated.

When Lord Bute in 1762 was trying to drive the Duke of Newcastle from the Ministry by repeated slights, that which the Duke felt most keenly was a summons to a Cabinet Council to consider a declaration of war with Spain when no papers had been supplied to him by the Secretary of State, nor information as to the course which negotiations were taking. 'Even Mr. Pitt', said the Duke, 'had that attention to me as constantly to send me his draughts with copies for my use, desiring me to make such alterations as I should think proper, before he produced them at the meeting of the King's servants.'<sup>3</sup>

The same distinction is noticeable a few years later. The second Lord Hardwicke, when invited to become Secretary of State in Lord Rockingham's Ministry in 1766, declined to do so on the ground of health, but expressed his willingness to join the 'Cabinet Council with the communication of papers'.<sup>4</sup>

<sup>1</sup> *Grenville Papers*, ii. 256; iii. 15, 41.

<sup>2</sup> Lord Lyttelton in April 1767 sent a list of a proposed Cabinet to G. Grenville. It consists of fourteen names. He says that he has mentioned 'only the principal Cabinet Officers', but the list includes the Lord Chamberlain and the Master of the Horse (*Grenville Papers*, iv. 8). The Chancellor of the Exchequer was not usually a member of the Cabinet unless that office was held together with the First Commissionership of the Treasury, but Charles Townshend teased Chatham into allowing him a place in the inner Cabinet, and when North succeeded him as Chancellor of the Exchequer the dearth of business capacity in the Ministry brought him at once into the Cabinet; *Grafton Memoirs*, pp. 92, 183.

<sup>3</sup> *Rockingham Memoirs*, i. 103.

<sup>4</sup> *Ibid.* i. 330.

Shelburne described the Cabinet to Bentham as consisting of an outer circle and of the Cabinet *with the circulation*, that is, with access to important State papers sent round in Cabinet boxes to the inner circle of ministers,<sup>1</sup> a practice in force at the present day.

Again, in a debate of the year 1775 in the House of Lords, the former members of the Duke of Grafton's Ministry tried to free themselves from blame for the measures which had troubled our relations with the colonies. Lord Mansfield denied all responsibility, though he admitted that he had been a member of the Cabinet during the latter part of the reign of George II and the whole of the current reign. But he said that there was a 'nominal and efficient Cabinet', and that he had ceased to be an efficient member from the close of the Grenville Ministry. In the same debate the Duke of Richmond told the House that 'the correspondence with our Foreign Ministers is sent round at a convenient time in little blue boxes to the *efficient* Cabinet Ministers, and that each of them gives his opinion on them in writing'.<sup>2</sup>

The *Confidential Cabinet* was another term applied to the inner circle of ministers who determined the policy of the country. When the Duke of Grafton was out of office in 1771 the King gave orders that he should be kept informed 'of all business of any importance that was in agitation'.<sup>3</sup> When he accepted the Privy Seal later in the same year, he did so on condition that he should not be summoned to meetings of the confidential Cabinet. George III agreed to this, remarking that Grafton 'had ever thought the confidential Cabinet too numerous',<sup>4</sup> and had, when Prime Minister himself, desired that Lord Bristol, who succeeded Chatham as Privy Seal in 1768, should not be summoned to the meetings of that body. But it seems clear that the King and Lord North expected to have Grafton's advice whenever they wanted it, and the Duke, whether in or out of office, appears to have occupied the position of a 'non-efficient' Cabinet minister.

One result of this distinction between efficient and non-

<sup>1</sup> Bentham, ix. 218.

<sup>2</sup> *Parl. Hist.* xviii. 278.

<sup>3</sup> *Grafton Memoirs*, pp. 263–4.

<sup>4</sup> *Correspondence of George III and Lord North*, i. 76; (ed. Fortescue) ii. 255.

efficient members of the Cabinet was that statesmen who had once been Cabinet Councillors considered themselves to remain within the outer circle of the Cabinet, even though their political opponents held the great offices of State.

Thus the Pelhams in 1745, finding themselves in a position to make terms with George II, insist that Lord Bath, who had always been their most active political opponent, 'should be out of the Cabinet Council'.<sup>1</sup>

Still more noticeable is the position of Lord Mansfield as described by himself in 1775. He had been a member of the 'efficient Cabinet' down to the close of the Grenville Ministry. When Rockingham succeeded Grenville, 'he had prayed his Majesty to excuse him: and from that day to the present day had declined to act as an efficient Cabinet Minister'.<sup>2</sup> His reason for refusing to act with the Cabinet when Rockingham came in was, as appears from his speech, that he was opposed to its policy, but he considered that he had never ceased to be a Cabinet minister, and was ready to give advice when asked.

This retention of Cabinet rank and position by men who had ceased to be in accord with those who were actually administering the affairs of the country must have been a constant source of insecurity to ministries. There can be no doubt that it offered opening for intrigue to George III, who never trusted the ministers whom he disliked, and who held himself entitled to consult these titular Cabinet ministers to the disadvantage of those who were, at the moment, in his service.

The disappearance of this titular external Cabinet must have been gradual. The Rockingham Cabinet of 1782 was a definite group of eleven persons, each of whom held high office. Fox complained that the number was too large, but at the same time maintained 'that those who had great responsible situations should have more interest in the Cabinet than those who merely attended to give counsel, without holding responsible situations'.<sup>3</sup> This contemplates an outer and an inner circle within the Cabinet: but Fox was probably thinking of the opposition which he had

<sup>1</sup> Coxe, *Memoirs of H. Pelham*, i. 295.

<sup>2</sup> *Parl. Hist.* xviii. 274, 275, 279.

<sup>3</sup> *Parliamentary Register*, vii. 304.

experienced from Camden and Grafton, the President of the Council and the Lord Privy Seal.<sup>1</sup>

The last assertion of the right to attend a Cabinet meeting by a minister who had ceased to hold Cabinet office was made by Lord Loughborough. When Addington succeeded Pitt in 1801 Eldon displaced Loughborough as Lord Chancellor, but Loughborough nevertheless continued to attend Cabinet meetings and retained his key of the Cabinet boxes. Addington was compelled to write and inform him that 'His Majesty considered your Lordship's attendance at the Cabinet as having naturally ceased upon the resignation of the Seals', and added that his opinion, expressed and acted upon, was that 'the number of Cabinet Ministers should not exceed that of the persons whose responsible situations in office require their being members of it'.<sup>2</sup>

Perhaps the last appearance of the non-efficient, titular Cabinet is to be found five years later, when Lord Colchester, then Speaker of the House of Commons, records that before the opening of Parliament the King 'held (what is called) a Grand Cabinet or Honorary Cabinet, consisting of his Ministers, and also the Archbishop of Canterbury, and the great officers of the Household, viz. the Lord Chamberlain and the Master of the Horse, the Speaker, &c., at which the draft of his speech was read'.<sup>3</sup> With the exception of the Speaker this recalls the Cabinet described by Lord Hardwicke.

The definition and limitation of the Cabinet by Addington, though it probably did no more than express the usage of the previous twenty years, marks a stage in the history of the Cabinet. The existence of a circle of non-efficient Cabinet ministers who might occasionally be called upon to advise, made collective responsibility impossible, because the persons composing this outer circle were often actually hostile to those who held 'responsible situations'.

<sup>1</sup> *Memorials of Charles James Fox*, i. 454: 'It was very provoking for you, I must own', said Shelburne to Fox, 'to see Lord Camden and the Duke of Grafton come down, with their lounging opinions to outvote you in the Cabinet.'

<sup>2</sup> Campbell, *Lives of the Chancellors*, vi. 326–7.

<sup>3</sup> *Diary of Lord Colchester*, ii. 26. The speech is now formally approved at a Council, at which more than the minimum three members are present (A. Fitzroy, *Memoirs*, i. 119), but this is not requisite, and may be dispensed with (*ibid.* ii. 756 f.) as in 1921.

In fact, responsibility was sometimes repudiated in a manner which we should now regard as inconsistent, not merely with party loyalty, but with self-respect.

When the Duke of Grafton's Ministry was falling into discredit, Lord Camden, who had been Chancellor throughout the administration, and was holding office at the time, spoke strongly in opposition to his colleagues, and stated that he had been an unwilling party to their actions in the matters concerning Wilkes and the Middlesex election.<sup>1</sup>

A few years later he repudiated all liability for the action of the Cabinet, of which he was a member, in the imposition of the tea duties on the American Colonies. In the same debate, Grafton, while complaining of the manner in which Camden disavowed his colleagues in a matter to which the whole Cabinet consented, went on to say that this tax 'was no measure of his', though he was Prime Minister at the time.

Party loyalty, as we understand the term, was practically unknown in the middle of the eighteenth century. The lack of definite political issues, and the state of our Parliamentary representation, resulted in a stagnation of political interest and the formation of parliamentary groups, whose action was determined almost entirely by personal ambition or the desire for lucrative office. George II resented the domination of such groups, though he had to endure it. George III formed a group of his own. Both Kings desired to break up parties, and to find ministers who would attend to the business of their departments, leaving general policy to the Crown. Hence the constantly expressed desire for a ministry 'on a broad bottom', that is, a ministry representative of the various groups. Such a ministry could only exist where political opinions were indeterminate rather than various. The Grenville connexion represented the ambitions of the Grenville family; the Bedford group, a desire for the emoluments of office; the followers of the elder Pitt were the admirers of a great but somewhat wayward personage; the Rockingham Whigs desired to make the King subservient to a party which should consist of the great Whig families; George III and his friends represented antagonism to this policy. A Cabinet

<sup>1</sup> *Grafton Memoirs*, p. 246.

formed out of any combination of these groups was not likely to possess any strong sense of mutual loyalty or collective responsibility.

The recognition of such responsibility begins in the last twenty years of the century. Fox in 1782 held himself responsible to Parliament for advice as to conferring a pension on Colonel Barré, although 'he was not the person in whose department it lay to advise the King on that subject'.<sup>1</sup> Yet his views on this subject, as we shall shortly see, were not consistent. Ministerial responsibility meant to the statesmen of the eighteenth century something different from what it means to us. To them it meant legal responsibility, liability to impeachment; to us it means responsibility to public opinion, liability to loss of office. Legal responsibility could not fairly be fixed upon an entire Cabinet for the action of one of its members, and this comes out clearly in a debate which took place in 1806, on the acceptance by Lord Ellenborough, the Chief Justice of the King's Bench, of a seat in the Cabinet. Exception was taken to the appointment on the ground that the Chief Justice might, as a member of the Cabinet, be responsible for the institution of legal proceedings over which he would have to preside as a judge. The supporters of the Government disputed the theory that each member of the Cabinet was responsible for the acts of the whole body; they maintained that each was responsible for his own department. 'The Cabinet was not responsible as a Cabinet,' said Lord Temple, 'but the Ministers were responsible as the officers of the Crown.' Fox maintained that there was a practical advantage in relieving the Cabinet of responsibility and fixing it upon the individual minister. 'The immediate actor can always be got at in a way that is very plain, easy, and direct, compared to that by which you may be able to reach his advisers.'<sup>2</sup>

It is noticeable that Hallam, writing in 1827, takes the same view of Cabinet responsibility.<sup>3</sup> At the present time we

<sup>1</sup> *Parliamentary Register*, vii. 382.

<sup>2</sup> Cobbett, *Parl. Debates* (1806), vi. 308, 311.

<sup>3</sup> Hallam, *Hist.* iii. 187, note: 'I cannot possibly comprehend how an article of impeachment for sitting as a Cabinet Minister could be drawn, nor do I conceive that a privy councillor has a right to resign his place at the board, or even to absent himself when summoned: so that it would be

are more ready to fear that ministers will mismanage our affairs than that they will break the law; they act under close and constant criticism, and, since loss of office and of public esteem are the only penalties which ministers pay for political failure, we can insist that the action of the Cabinet is the action of each member, and that for the action of each member the Cabinet is responsible as a whole. But a member may save his colleagues by resignation of office.

It is needless to cite modern illustrations of the complete acceptance of the theory. Sir S. Low has given one which well serves the purpose.<sup>1</sup> An amendment to the Address was moved early in the Session of 1902, censuring the conduct of the Post Office in respect of the terms of an agreement with the National Telephone Company. Supporters of the Government moved the amendment and pressed it in debate: but they were told that if they carried the amendment, which censured the action of a single department, they would pass a vote of censure on the Government, which would thereupon resign.<sup>2</sup> The amendment was consequently lost, by the failure of those who moved it, and spoke in its favour, to support it on a division. The collective responsibility of the Government for the action of one of its members could not be better illustrated.

Joint responsibility must produce unanimity, or at any rate is incompatible with such differences as make the dissentient unwilling to incur risk for the sake of opinions which he does not share. The efficient Cabinet was bound to keep up a semblance of agreement in the advice tendered to the King, but, until collective responsibility was recognized, a minister might be content to be outvoted, retain office, and carry out a policy with which he did not agree.

Whether the King should or should not be informed that there had been hesitation or difference of opinion among his ministers, and the nature of the difference, must rest with the discretion of the Prime Minister, who reports to the King the substance of what has passed at every Cabinet meeting. The advice ultimately given must be unanimous.

highly unjust and illegal to presume a participation in culpable measures from the mere circumstance of belonging to it.'

<sup>1</sup> Low, *Governance of England*, p. 146.   <sup>2</sup> *Parl. Deb.*, 4th Ser. ci. 1027.

When Lord Grey's Government resigned in 1832 on a difference with the King as to the creation of peers, a Cabinet minute which recorded the dissent of the Duke of Richmond from the opinion of his colleagues was shown to the Duke of Wellington, who was invited to form a Ministry. After the failure of the Duke and the return of Lord Grey to office, this difference of opinion among Lord Grey's colleagues was turned to their disadvantage in debate. But the trouble was occasioned, not so much by the disclosure of differences in the minute, as by the communication of a Cabinet minute to the opponents of the minister who framed it.<sup>1</sup> This is unquestionably contrary to custom.

Although the Premier may determine whether he will disclose to the King such differences as have existed among his colleagues,<sup>2</sup> it does not appear to be equally open to the King to probe these divisions of opinion among his confidential servants. 'They are a unity before the sovereign.'<sup>3</sup>

George IV was not pleased with the recognition by Canning of the independence of the Spanish American Republics, and he addressed a memorandum to Lord Liverpool, at the close of which he desired 'distinctly to know from his Cabinet, individually (*seriatim*), whether certain principles of policy *are or are not to be abandoned*'. The Cabinet returned an answer 'generally and collectively', admitting that there had been differences, but assuring the King of their 'unanimous opinion' that their policy in no way conflicted with the principles to which the King referred.<sup>4</sup>

Closely connected with what has gone before is the secrecy which is imposed on ministers as to what passes in the Cabinet. Formally this depends on the oath of the Privy Councillor, but the obligation to secrecy has been strengthened since the time when the members of the Grafton Cabinet, 1767–70, were quite ready to announce the part which they had taken

<sup>1</sup> *Corresp. of William IV and Earl Grey*, ii. 395, 424, 431.

<sup>2</sup> See, e.g., Lord Salisbury's report on the Cabinet's views as to Greece in 1897, *Letters of Queen Victoria*, 3rd Ser. iii. 133; and Disraeli's candid disclosures in Nov. 1877, *Life of Disraeli*, vi. 194. Lord Rosebery, Balfour, and Asquith seem to have been no less candid in disclosures.

<sup>3</sup> Gladstone, *Gleanings of Past Years*, i. 74. But see Fitzmaurice, *Life of Lord Granville*, i. 355, 459, and p. 132, *post*.

<sup>4</sup> Stapylton, *George Canning and His Times*, pp. 418–20.

in Cabinet discussions on the expulsion of Wilkes and the taxation of the American Colonies.

No record was up to 1916 kept of transactions or discussions in the Cabinet. The Prime Minister sent to the King an account of what had passed, which might be more or less formal, according to circumstances or the discretion of the Prime Minister for the time. This has been replaced by the keeping of minutes of decisions only—not of individual opinions—which are sent to the King after approval by the Prime Minister.<sup>1</sup> Such memoranda are not available to succeeding ministers, and in modern times we do not come across their contents. But Shrewsbury kept minutes, as we have seen, of what passed at the Cabinets of William III; and even as late as 1807, when George III dismissed the Grenville Ministry, Lord Grenville sent to the Speaker copies of a Cabinet minute, of the King's answer, and of the Cabinet's reply.<sup>2</sup>

William IV had no strong sense of the confidential character of his communications with his ministers. He communicated, as we have seen, to the Duke of Wellington an account sent to him of what had passed at a Cabinet meeting by Lord Grey; and he addressed to Sir Robert Peel, on his taking office in 1834, a lengthy document setting out among other things the conversations which had passed between himself and Lord Melbourne, leading up to the retirement of the latter. It does not appear that Melbourne was invited either to assent to this communication or to test its accuracy.<sup>3</sup>

Disclosures of Cabinet discussions are now made only with permission of the Sovereign; and it is the practice that this permission should be obtained through the intervention of the Prime Minister, and that the disclosure should be strictly limited by the terms of the permission granted.<sup>4</sup> Lord Mel-

<sup>1</sup> For the Cabinet Secretariat since 1916 see Lloyd George, *Commons Deb.* clv. 265; A. Chamberlain, 223. See also Cd. 9005; Cmd. 325; Sir J. Simon, *The Times*, 23 Dec. 1931. Its functions under the Prime Minister's control include circulation of agenda, recording and communicating decisions, and securing the necessary memoranda for the information of members; it has no executive or administrative functions. It does not disclose to a subsequent ministry the views of its predecessor.

<sup>2</sup> See Lord Colchester's *Diary*, ii. 108; *Melbourne Papers*, p. 247.

<sup>3</sup> *Melbourne Papers*, p. 248; *Stockmar Memoirs*, ch. xiv.

<sup>4</sup> *Parl. Deb.*, 3rd Ser. cciv. 1186.

bourne remonstrated strongly with William IV on learning that Lord J. Russell had, without reference to the Prime Minister, received the King's permission to disclose in Parliament a correspondence between himself and Lord Durham, and the discussions in the Cabinet on which this correspondence was based: 'If the arguments in the Cabinet are not to be protected by an impenetrable veil of secrecy, there will be no place left in the public counsels for the free investigation of truth and the unshackled exercise of the understanding.'<sup>1</sup> The lack of any record of Cabinet discussions may, at times when disclosures are permitted to be made, cause questions to be raised as to their accuracy.<sup>2</sup> The irregular disclosures in 1931 showed the grave difficulty of determining the true state of facts. The rule of secrecy is usually waived to allow a minister who resigns to explain the grounds of his action.<sup>3</sup>

At times the veil is lifted. Sir William Molesworth, in the Ministry of Lord Aberdeen, took notes of what passed in the Cabinet of which he was a member, not without some remonstrance on the part of a colleague, nor without some ill consequences as to the maintenance of secrecy.<sup>4</sup> Lord Granville obtained permission from Queen Victoria and Lord Palmerston to send to Lord Canning, then Viceroy of India, a chronicle of Cabinet proceedings from day to day.<sup>5</sup> The Greville Memoirs for the last years of the Melbourne Ministry indicate pretty plainly that some member of the Cabinet confided to the Clerk of the Council very full accounts of what passed at Cabinet meetings. But the publication even of a Cabinet memorandum is an offence under the Official Secrets Act, 1911, as was emphasized in 1934, when Mr. Edgar Lansbury was fined for printing a memorandum of his father on unemployment. It was announced in October 1934 that ministers had been asked to return copies of memoranda which they had retained on leaving office.

<sup>1</sup> *Melbourne Papers*, p. 216.

<sup>2</sup> *Parl. Deb.*, 3rd Ser. cccxli. 1809, 1810 (18 July 1878).

<sup>3</sup> e.g. the Duke of Devonshire in 1904; *Parl. Deb.*, 4th Ser. cxxx. 349 ff. For irregular disclosures see also *Commons Deb.* xcvi. 1716. Taking of notes in Cabinet was forbidden by Salisbury (Lady G. Cecil, *Life*, ii. 223) and Oxford (*Fifty Years of Parliament*, ii. 197).

<sup>4</sup> *Autobiography of the Duke of Argyll*, i. 461.

<sup>5</sup> Fitzmaurice, *Life of Lord Granville*, i. 126. See also a very interesting description of a Cabinet meeting at p. 356.

It happens at times that a minister who is not a Privy Councillor or a naval or military officer, attends a meeting of the Cabinet in order to give information or to receive instructions. It might be questioned whether a meeting can be regarded as a meeting of the Cabinet while a person is present who is under no obligation to secrecy. Attention was called, in 1905, to the fact that Lord Cawdor, after accepting the office of First Lord of the Admiralty, but before his appointment was complete, and before he had been sworn of the Privy Council, attended meetings of the Cabinet. His presence was placed, by Lord Lansdowne, on the footing of that of the Law Officers who are sometimes called in to advise the Cabinet; but it would seem that he was regularly summoned and sat as a Cabinet minister.<sup>1</sup>

Since the War the presence of outsiders at Cabinet meetings to make statements has not been rare, reviving a usage common in the eighteenth century.

### § 3. THE RELATIONS OF THE CABINET TO THE PRIME MINISTER, THE CROWN, AND THE COMMONS

#### *The Development of the Premiership*

The existence of a Prime Minister may be said to date from the disappearance of the King from the Cabinet Council.

We are accustomed to regard a Prime Minister as a necessity of our Constitution, and we understand the term to mean the party leader who has been invited by the King to form a Ministry, in the assurance that his followers are sufficiently numerous, and sufficiently loyal, to secure support for the measures which he may recommend to the Crown and to Parliament.

But the statesmen whom we are wont to call Prime Ministers, between 1660 and 1714, had no such power in the

<sup>1</sup> *Parl. Deb.*, 4th Ser. cxlii. 863. This must have been an irregularity; A. Fitzroy, *Memoirs*, i. 242 f.; ii. 600 f. In 1907, during the interval which elapsed between the acceptance by Mr. McKenna of the office of President of the Board of Education and his admission to the Privy Council, more than one meeting of the Cabinet was held. Mr. McKenna received no summons to these meetings, though he was informally requested to attend one of them for a short time, merely to discuss a matter connected with the business of the Education Office.

choice of their colleagues or security for the support of their measures.

The title itself was unknown till the commencement of the eighteenth century. Ormond suggested to Clarendon, in 1661, that he should give up office and confine himself to advising the King on questions of general policy. Clarendon declined to enjoy a pension out of the Exchequer 'under no other title or pretence but of being *first Minister*, a title so newly translated out of French into English, that it was not enough understood to be liked, and every man would detest it for the burden it was attended with'.<sup>1</sup>

The suggestion shows the position which Clarendon occupied in the eyes of his contemporaries, and that he was, in point of power and influence, what passed for a Prime Minister in those times. But Clarendon had not the choice of his colleagues; the inner Council of Advisers was increased by the introduction of Ashley, and later of Coventry, without his concurrence,<sup>2</sup> and without consulting him Charles made Bennet a Secretary of State.<sup>3</sup> Nor had Clarendon a decisive voice in measures which should be submitted by members of this inner Council to Parliament.<sup>4</sup>

No one corresponding to a Prime Minister could be said to have existed throughout the reign of William III. The celebrated Whig Ministry of William III had no recognized leader. Judging from the extant correspondence one would say that Shrewsbury first,<sup>5</sup> and Somers later, enjoyed the largest measure of William's confidence. Burnet speaks of the management of the King's affairs, for Parliamentary purposes, as being in the hands of Sunderland from 1693 to 1698;<sup>6</sup> but Sunderland was too unpopular in the country to take any prominent part in public affairs; in fact he only accepted the office of Lord Chamberlain in 1697, and held it for a year. It is significant that he was frightened into retirement by the wrath of the Whig junto at the appoint-

<sup>1</sup> Clarendon, *Autobiography*, i. 420. In Sir John Reresby's *Memoirs* (ed. Cartwright) Clarendon is spoken of as 'the Great Minister of State', p. 53; Buckingham as 'the Principal Minister of State', pp. 76, 81; Danby as 'the Chief Minister', p. 168. <sup>2</sup> Clarendon, *Autobiography*, ii. 344, 460.

<sup>3</sup> *Ibid.* ii. 226.

<sup>4</sup> *Ibid.* ii. 344-9.

<sup>5</sup> Turner, *The Cabinet Council*, i. 283-8.

<sup>6</sup> Burnet, *History of My Own Time*, iv. 207, 208, and notes.

ment of Vernon as Secretary of State by the King, on his advice,<sup>1</sup> and without consulting any other ministers.

Nor can it be said that throughout the reign of Anne any minister had the commanding position which we associate with the Premier. Godolphin, by slow degrees, ousted his rivals, Harley and St. John, from the Cabinet, and when Anne determined once more to employ the Tory advisers who really possessed her confidence, Godolphin bore the dismissal of his friends and the appointment of his foes without seeming to consider his own retirement was thereby rendered imperative.

Harley is repeatedly described by Swift as first minister,<sup>2</sup> or chief minister, and it is in the writings of Swift that we first find the term Prime Minister.<sup>3</sup> But Harley did not choose his own colleagues, nor could he exclude from the Cabinet persons opposed to his policy.<sup>4</sup> His reluctance to push measures to an extremity with his opponents, by insisting on their removal from all political office, caused something like a rebellion in his own camp. The October Club wanted a Prime Minister of their own choosing, and a full share of the spoils of victory; the Queen was not prepared to admit that any one ruled but herself. Harley stood between a party who wanted much, and a mistress who would concede little; he had not at his command the party-discipline, now at the command of a party-leader, which would have enabled him to put constraint on the Queen, nor the full confidence, now accorded to a Prime Minister by the Sovereign, which would have enabled him to satisfy the demands of his party.

Walpole was the first Prime Minister in the modern sense of the word. It is true that he differed in many respects as to the extent and the sources of his power from the Prime Ministers of the present day. Within the Cabinet there was often a fierce struggle for predominance. Carteret sat there for nine years. For the first three he was a formidable rival as Secretary of State; for the last six he was a malcontent colleague, prepared to take every opportunity of weakening

<sup>1</sup> Macaulay, viii. 20.

<sup>2</sup> 'Memoirs relating to change in the Queen's Ministry', Swift, xv. 24.

<sup>3</sup> 'Inquiry into the behaviour of the Queen's last Ministry', Swift, xvi. 19, and again in the preface to the *History of the last four years of Queen Anne*, p. 38, we find the term used with a recognition of its novelty, 'those who are now called prime ministers'.

<sup>4</sup> Ibid. xv. 61.

the power of the First Lord of the Treasury. Townshend, during the last months of his tenure of office as Secretary of State, struggled hard to displace Walpole. Nor was Walpole ever invited by the King, as a modern Prime Minister is invited, to form a Ministry of persons who would act harmoniously with him. He entered the Cabinet as a man of acknowledged political eminence, joining a body of men with whom he was in agreement on the chief questions of the time, and he established himself as Prime Minister by the gradual expulsion of those who were inclined to dispute his pre-eminence.

He owed his power to three causes: the favour of the King, his recognition of the fact that the true source of power was to be found in the House of Commons, and his skill in forming and keeping a compact working majority in that House. He enjoyed the favour of the King largely because he had impressed the vigorous understanding of Queen Caroline with a sense of his value to the Hanoverian dynasty. The bellicose temper of George II would have inclined him to prefer Carteret, who was for a spirited foreign policy. Caroline saw that peace and low taxes were the best security for her husband's throne, and in these matters she governed her husband.

And the favour of the King reacted on his power of keeping a majority together. A minister had money and places to bestow; Walpole used these advantages with skill, and without scruple.<sup>1</sup> His followers knew that they might not fare so well under a successor, but he never put their fidelity to the test by a resignation which would have shown whether they were prepared to stand by him in opposition and force him upon the King.

He was Prime Minister in fact because his will controlled

<sup>1</sup> Morley (*English Statesmen, Walpole*, pp. 121–9) tried hard to exonerate Walpole from charges which had remained practically unanswered for more than a century: but the circumstantial evidence is irresistible. Mr. Edgecumbe and Lord Islay had managed respectively the Cornish and Scots constituencies; the former was opportunely raised to the Peerage, and both pleaded privilege and refused to answer before the Committee of Inquiry. So did Paxton, the Solicitor to the Treasury, though he was sent to Newgate for his refusal. And we have Walpole's advice, when out of office, to Henry Pelham: 'You must be understood by those that you are to depend upon; and if it be possible they must be persuaded to keep their own secret;' Coxe, *Memoirs of H. Pelham*, i. 93. See Taylor, *Robert Walpole*, pp. 64–81.

the action of the Government, and because he had contrived to drive from the Ministry every one whose opposition was in any respect formidable. He watched public opinion, and deferred to it sooner than risk his continuance in office, and regardless of his own views of right or wrong. But he was most unwilling to be called a 'Prime Minister', because to the popular mind that term did not signify a leader chosen by the people, but a favourite of the Court. Thus, when charged with being 'sole Minister' or 'prime vizier', he replied that he was only one of the King's Council, and had no more voice in affairs than any other member of the Cabinet.<sup>1</sup>

We have dwelt thus on the position of Walpole because, widely though his position differs from that of a Prime Minister of modern times, it rested largely on the support of a Parliamentary majority which he knew better than any one else how to obtain. Not many years after his death the arts of Parliamentary management had so far progressed that the Pelhams were able to put pressure on the King to admit William Pitt to office. They and their friends resigned in a body, and left no possible minister at once acceptable to the King and the majority of the Commons.<sup>2</sup>

The efforts of George III to control the composition of Cabinets and the direction of policy produced confusion for the first ten years of his reign, and national misfortune during the next twelve. But there grew out of this a party, not strong in numbers or Parliamentary influence, but connected together by a determination to resist Royal influence, and claiming that if they were to serve the King at all they must come into office as a party with a leader of their own nomination. Cabinet and party government appear with some distinctness of outline in the theory, though not fully in the practice, of the Rockingham Whigs. The King resented and disputed the insistence by a party on its right to nominate its leader as Prime Minister,<sup>3</sup> and politicians were not yet

<sup>1</sup> *Parl. Hist.* xi. 1380: and see the protest of the dissentient Lords on a motion to remove Walpole, 'Because we are convinced that a sole, or even a first Minister is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any Government.'

<sup>2</sup> Coxe, *Memoirs of H. Pelham*, i. 289.

<sup>3</sup> Stapylton, *Canning and His Times*, pp. 203, 208; *Grafton Memoirs*, p. 355.

prepared to admit that such a personage was necessary for the working of Government.

In 1783 the Duke of Grafton, when asked to join Lord Shelburne's Ministry, told Shelburne that he would not consider him as Prime Minister,<sup>1</sup> but only as holding the principal office in the Cabinet. In the Coalition Ministry which succeeded Shelburne, the Duke of Portland was placed at the Treasury, while Fox and North shared the practical control of affairs. A similar arrangement was proposed in 1803 by Addington to Pitt, the proposal being conveyed by Dundas. Addington thought it possible that he and Pitt might be Secretaries of State, with a First Lord of the Treasury of no political importance, and that there should be no Prime Minister. But Pitt had been for seventeen years (1784–1801) a Prime Minister in the modern sense of the word, possessing the full confidence of the King, and working with a Cabinet in which his supremacy was undoubted. He told Dundas that it was 'an absolute necessity in the conduct of the affairs of this country that there should be an avowed and real Minister possessing the chief weight in the Council and the principal place in the confidence of the King. That power must rest in the person generally called First Minister.'<sup>2</sup>

It may be said then that before 1832 it was essential to the position of a Prime Minister, first, that he should hold the 'principal place in the confidence of the King', and next, and following from it, that he should possess 'the chief weight in the Council'. The second of these requirements followed upon the first, because, unless the Prime Minister possessed the King's full confidence, he might be fettered in the choice of his colleagues, or they might embarrass his action by dissent or intrigue. A King such as George III might even use his Parliamentary influence, as in 1784 and 1807, to overthrow a minister and a Cabinet loyal to one another but unacceptable to himself.

Two changes had come over the working of Cabinet Government in the latter part of the eighteenth century, both tending to define and strengthen the position of the First Minister of the Crown. Cabinets had become smaller and limited to their

<sup>1</sup> Fitzmaurice, *Life of Shelburne*, iii. 343; *Grafton Memoirs*, p. 361.

<sup>2</sup> Stanhope, *Life of Pitt*, iv. 24.

efficient members. The confidential Cabinet as distinct from the outer circle disappears. Cabinet and responsible office go together. Loughborough's claim to sit at Cabinet meetings when he had ceased to be Chancellor was twenty years out of date, though it is a useful event to the historian for the purposes of definition. The Rockingham Cabinet of 1782 consisted of eleven persons, and Fox thought it was too large. Pitt's Cabinet in 1784 consisted of seven persons only. Responsibility was thus concentrated, and was concentrated in the immediate and confidential friends of the Prime Minister.

At the same time the Cabinet had become more closely connected with the administration of the departments of government, not merely by the disappearance of the Archbishop, the Lord Chamberlain, and the Master of the Horse from among its number, but from the altered position of the Secretaries of State. They were no longer the mere channels of communication between the King in Council and the outside world.<sup>1</sup> After 1782 they became responsible, respectively, for Home and Foreign Affairs.

We may note the closer connexion of the Cabinet with administrative duties if we follow the composition of Cabinets from Pitt's first Ministry to his last.

In 1784 the Cabinet consisted of seven persons, the Chancellor, Lord President, and Lord Privy Seal, the First Lords of the Treasury and Admiralty, and the two Secretaries of State. In the Cabinet of 1805 we find in addition to these a third Secretary of State for War and the Colonies, the Master of the Ordnance, and the President of the Board of Control; Trade and the Post Office were represented by a single minister, and the Chancellor of the Duchy of Lancaster concludes the list.

The size of Cabinets has grown with the requirements of Scotland, the Dominions, and formerly Ireland, Local Government and Health, Air Defence, Trade, Education, Agriculture to be represented therein. But this does not weaken the position of the Prime Minister. His colleagues are for the most part engrossed in the work of laborious offices; they have, save in the case of Coalition Ministries as in 1916 and 1922, neither the leisure nor the inclination for the sort of

<sup>1</sup> Cf. in 1711 *Parl. Hist.* vi. 979: 'A Secretary of State gives no direction but from the Cabinet Council.'

political intrigue which was often fatal to the Ministries of George II and George III. Nor do they any longer claim, as Shelburne's colleagues claimed in 1783, that the Prime Minister should make no addition to their number without the consent of the entire Cabinet.<sup>1</sup> Queen Victoria disapproved Lord John Russell's consultation of the Cabinet as to Lord Palmerston's successor in 1851,<sup>2</sup> and Lord Oxford excludes this topic from Cabinet authority as well as other appointments.<sup>3</sup>

But the extension of the franchise has done more than anything else to enhance the position of the Prime Minister. He becomes more and more the direct choice of the people, as the House of Commons has become more and more the reflection or the mouthpiece of popular opinion. It is obvious that, when the result of a general election sends to the House of Commons a large majority of members bound by promises to their constituents to support the policy of some one individual statesman, the relations of such a man with the Crown, with his colleagues, with the majority which supports him in the House of Commons, are very different to those of a minister of the last century, who in the last resort could only appeal to nomination boroughs or close corporations, or at the best to county constituencies seldom stirred to a vivid interest in political affairs.

But enough has been said to indicate the growth of the idea that a Prime Minister, though unknown to our constitutional law, is a necessary part of our constitutional conventions. We should now regard the actual relations of the Prime Minister to the Crown and to his colleagues.

### *The Prime Minister and his Colleagues*

A man becomes Prime Minister by kissing the King's hands<sup>4</sup> and accepting the commission to form a Ministry. If

<sup>1</sup> *Grafton Memoirs*, p. 359.

<sup>2</sup> *Letters of Queen Victoria*, ii. 419; the Cabinet preferred Clarendon but Granville was appointed. The Duke of Argyll records another case in Palmerston's Ministry of 1855 (*Autobiography*, i. 541, 545). See p. 135, *post*.

<sup>3</sup> *Fifty Years of Parliament*, ii. 194. As to other appointments such consultation seems less rare; Newton, *Lord Lansdowne*, p. 49, shows informal consultation in the case of the Viceroyship and the Queen's initiative; she also suggested his tenure of the Foreign Office (p. 190).

<sup>4</sup> The appointment ought to be made in the United Kingdom; Mr. Asquith's appointment in Biarritz was a constitutional anomaly; Lee, *King*

one Prime Minister succeeds another without a change of Government, as in 1894, 1902, 1908, and 1923, he is spared a process which is not unattended with labour and disappointment.<sup>1</sup> In such a case ministers do not vacate their offices, for these are not held of the Prime Minister, but they are presumed to be at his disposal, and he can ask his colleagues to retain them or not as he pleases. Lord Elgin in 1908 was removed from the Colonial Office against his wishes,<sup>2</sup> while other changes were made.

The Prime Minister is usually First Lord of the Treasury, with departmental duties which are merely nominal. If he is a peer it may be possible, though it can hardly be regarded as desirable, that he should undertake the duties of a department. Lord Salisbury's tenure of the Foreign Office illustrates this possibility. But the leadership of the House of Commons and the conduct of its business are so important a factor in the well-being of a Government, that no peer can be Prime Minister with satisfaction to himself or advantage to the country unless he can find a man who is at once qualified to lead the House of Commons and able to work in perfect accord with him and under him. This is no easy matter, and Lord Rosebery's relations with Sir W. Harcourt were so strained that their one occasion of cordial accord was in their agreement on resignation in 1895.<sup>3</sup> The power of the man who can say 'I will not be responsible for this or that to the House of Commons' is tremendous in the counsels of a Government, and almost incompatible with subordination to a Premier in the other House. The passing-over of Lord Curzon in 1923 in favour of Mr. Baldwin probably marks a constitutional convention excluding a peer from being Prime Minister.

To spend eight hours of every day in the House of Commons or its immediate neighbourhood ; to take an active and leading part in debate ; to be present and to speak on many public occasions, political or non-political ; to keep always in mind the general policy of the country, its relations with foreign

*Edward VII*, ii. 579–82. For that of Sir H. Campbell-Bannerman, see Lee, ii. 443.

<sup>1</sup> Morley, *Life of Gladstone*, ii. 629.

<sup>2</sup> Lee, ii. 582 ; A. Fitzroy, *Memoirs*, i. 347 ff.

<sup>3</sup> Oxford, *Fifty Years of Parliament*, i. 231 ; Gardiner, *Sir W. Harcourt*, ii. 310 ff.

powers, and the trend of oversea and domestic affairs; to recommend the right men to the King for the service of Church and State, is enough work for one man. The general supervision of the departments of government which was possible to Peel is not possible to the Prime Minister of to-day. He can do no more than keep a watchful eye on those departments which are concerned with matters of current importance, and trust to the discretion and loyalty of his colleagues in other departments to take no important step without consulting him. It lies with him to decide what issues demand Cabinet decision;<sup>1</sup> Lord Rosebery refused to call a Cabinet on the coercion of Nicaragua in 1895 despite Sir W. Harcourt's protest.

The Prime Minister causes the result of every Cabinet meeting to be communicated to the King, and is the intermediary between the Cabinet and the Crown; but every minister who is a head of a department is entitled to state his business directly to the King. The Prime Minister would not allow business peculiar to the department of one of his colleagues to be first submitted to himself, nor would he allow one minister to interfere in the department of another. No loyal colleague would, in his communications with the Sovereign, discuss matters of novelty or importance which had not been previously discussed with the Prime Minister, or, if necessary, with the Cabinet as a whole.<sup>2</sup> These, however, are counsels of perfection, and it is uncertain how far they prevail.

Gladstone criticized severely and justly the arrangement by which Lord Palmerston's dispatches were for a time submitted to Queen Victoria by the Premier, Lord John Russell.<sup>3</sup> Lord Melbourne returned to the Austrian Am-

<sup>1</sup> Gardiner, op. cit. ii. 331, 332.

<sup>2</sup> There was a grave breach of this principle in the correspondence which passed between Queen Victoria and Lord Granville in 1859 and in 1864. Palmerston and Russell were thought by the Queen to be acting contrary to her wishes and to the opinions of their colleagues, and she communicated her anxieties to Granville, who was a member of the Cabinet. His efforts to reassure her involved a departure from the loyalty due to his venerable leaders; but the situation was a very difficult one; Fitzmaurice, *Life of Lord Granville*, i. 350, 459.

<sup>3</sup> *Gleanings of Past Years*, i. 86, 87. He says that the Premier's criticisms should have been addressed to his colleague, 'and the draft as it goes to

bassador dispatches addressed to him as Prime Minister which should have been sent to Lord Palmerston as Foreign Secretary,<sup>1</sup> and alleged as one reason for refusing office to Lord Brougham that when Chancellor he had interfered in the business of the Irish Office without communication either with the Prime Minister or the Home Secretary in whose province the matter lay.<sup>2</sup>

It may be asked how the Prime Minister and the Cabinet are now enabled to keep in touch with the departments of government when these desire to make administrative changes, or require legislation for the development of their work. We have seen how engrossing are the labours of the Prime Minister. The Cabinet is made up of the chiefs of responsible offices, the administration of which in conjunction with work in Parliament occupies most of their time and thoughts. The difficulty is partly met by the use of Committees of the Cabinet.<sup>3</sup> If a department wants to take such action as is described—action needing the consideration of the Cabinet as a whole—the representative of the department in the Cabinet can introduce the business and obtain the appointment of a Cabinet Committee to consider the question and report, or decide upon it. There are also standing committees; that on Home Affairs considers Bills suggested by departments with a view to recommending the grant or withholding of authority for their introduction into Parliament; the Economic Advisory Council<sup>4</sup> continues the Committee of Civil Research established in 1925; the Imperial Defence Committee will be discussed below. The practical convenience of a Committee is that persons who are not members of the Cabinet may be called to act upon it. If the department is represented in the Commons by a minister who is not a member of the Cabinet, or if legal questions are involved needing the advice of the law officers, these men are available to serve on the Committee. By this means the minister who is in charge

the Sovereign should express their united view'. Lord Rosebery was rather inclined to half-hearted support of his colleagues; *Letters of Queen Victoria*, 3rd Ser. ii. 455.

<sup>1</sup> *Melbourne Papers*, p. 340.

<sup>2</sup> *Ibid.*, pp. 261, 262.

<sup>3</sup> For references to such bodies, see *Commons Deb.* cxx. 744 f.; clv. 264. They are often alluded to in Press communications.

<sup>4</sup> *Parl. Pap.*, Cmd. 3478 (1930).

of the business of the department in the House of Commons, if not a member of the Cabinet, has a full opportunity of expressing his views and of learning the mind of the Cabinet on the subject. The Prime Minister and the Cabinet obtain in a compendious form an account of the action contemplated, the reasons for and against it, and the materials for a decision.

The process to some extent supplies the lack of that constant supervision of the departments which a Prime Minister of to-day can no longer exercise.

It remains to be said that if a minister were to take any important step without reference to his colleagues they might find it necessary to disavow his action, and under such circumstances he must resign.<sup>1</sup>

The Committees appointed as we have described are very different from the inner conclave which sometimes grows up within a Cabinet. It is quite plain that among a group of nineteen or twenty persons there must be some who enjoy the special confidence of the Prime Minister, some whom he would be disposed to consult in respect of special lines of administration, others in general questions of policy, party or imperial. But this must depend greatly on the quality of a Cabinet and on the idiosyncrasy of the Prime Minister. Every Cabinet must contain men of very unequal merit who are placed in the Cabinet for very various reasons. There is a good deal of specialism in politics: one man may be exceptionally useful for party purposes in platform speaking throughout the country, another a powerful debater in the Commons, a third a skilled administrator, a fourth an expert in the details of party management; and there is usually a heritage of previous Cabinets, men who are there because it is difficult to leave them out. It must rest with the Prime Minister whether he will present his policy to the Cabinet as the outcome of his single brain, or whether he will take previous counsel with such of his colleagues as he considers capable of dealing with general questions of public interest. All recent Cabinets have been supposed to have had inner circles.

<sup>1</sup> Cf. Mr. Montagu's resignation in 1922 in view of his publication of the views of the Government of India on relations with Turkey; A. Fitzroy, *Memoirs*, ii. 775-7.

We may compare three Ministries of modern times, exceptionally strong in the experience and ability of their members: Lord Aberdeen's Coalition Ministry of 1852, Mr. Gladstone's Ministry of 1868, and the Ministry formed by Lord Salisbury in 1895. There is little sign of an inner circle in the history of the first two, though Lord Aberdeen did not possess the commanding qualities or strong will of Mr. Gladstone. But in the Ministry of 1895 the increased size of the Cabinet, the growth and pressure of departmental work, and perhaps the fact that the Prime Minister undertook the duties of a most exacting department, seem to have created a tendency to allow serious business to be transacted by the ministers specially concerned, and to settle matters of general importance without a summons of the Cabinet for purposes of consultation.<sup>1</sup>

It is evident that in these respects the relations of a Prime Minister to his colleagues must vary with individual character and temperament, and to some extent with circumstances. More especially must this be the case with appointments to office. Here the Prime Minister must obtain the formal approval of the King, but need consult no one.<sup>2</sup> Of such consultations as may take place we obtain rare glimpses. That they take place sometimes we may fairly assume: that they should take place on a large scale or in a formal manner is most unusual. The Duke of Argyll describes a curious departure from constitutional usage in this respect.

When the Palmerston Ministry of 1855 was weakened, almost immediately after its formation, by the retirement of Gladstone, Herbert, and Graham, the Prime Minister summoned his Cabinet and consulted them as to the mode of filling the vacant places. As a result of this discussion Lord John Russell was offered the Colonial Office, and other steps were taken: a little later Palmerston proposed to his Cabinet to add Lord Shaftesbury to their number, but the proposal was not well received and was abandoned.<sup>3</sup>

His colleagues look to the Prime Minister not merely for

<sup>1</sup> Low, *Governance of England*, p. 169.

<sup>2</sup> This was not the view of the Rockingham Whigs; *Grafton Memoirs*, p. 359. See Oxford, *Fifty Years of Parliament*, ii. 194; Morley, *Life of Gladstone*, iii. 101.

<sup>3</sup> Duke of Argyll, *Autobiography*, i. 541, 543.

direction and guidance, but for help in any Parliamentary difficulty in which they may find themselves. Formerly these difficulties arose chiefly from some misunderstanding between a minister and the King. The correspondence of Lord Grey and Lord Melbourne affords illustrations of the efforts which these Premiers were compelled to make in order to avert causes of offence between William IV and Lord Durham, Lord John Russell and Lord Palmerston, each in his way a somewhat difficult colleague.<sup>1</sup> Mr. Asquith had to apologize for Mr. Lloyd George's utterances on female suffrage and on foreign policy.<sup>2</sup> At the present time, when the Prime Minister is a member of the House of Commons, such help is usually afforded by intervention in debate.

The Prime Minister is not only supreme, among his colleagues, in the matter of appointment to offices, he is also entitled to demand of the King the dismissal from office of persons with whom he cannot work in the business of government. We are here met by the distinction between political and non-political offices.

Commissions in the army and navy have been held in theory without reference to political opinion ever since the dismissal of General Conway in 1764. Members of the permanent Civil Service are by law incapacitated from sitting in Parliament, and by custom exempt from political changes. The appointments to offices of the Household, especially those held by ladies, were formerly regarded as open to question as regards their tenure. In the days of the first Rockingham Ministry frequent complaint was made by the Prime Minister of the hostility or lukewarm support shown to the King's ministers by members of the King's Household sitting in Parliament.<sup>3</sup> But for some time past it has been settled that 'great offices of the Court and situations in the Household held by Members of Parliament should be included in the political arrange-

<sup>1</sup> *Correspondence of William IV and Lord Grey*, ii. 201; *Melbourne Papers*, pp. 201, 261, 262. Lord Salisbury in 1897 gracefully explains away Lord Lansdowne's action in changing names of regiments without royal assent; *Letters of Queen Victoria*, 3rd Ser. iii. 133. Cf. the incident in 1900 as to publication of dispatches, *ibid.* 533 ff.

<sup>2</sup> Lee, *King Edward VII*, ii. 651–5. The King's criticisms led to Sir E. Grey lecturing his colleagues on their obligations, Mr. Churchill having shared in Mr. Lloyd George's indiscretion.

<sup>3</sup> *Rockingham Memoirs*, i. 294, 299; Minutes of Melbourne Cabinet.

ments made on a change of administration'.<sup>1</sup> But, of course, the King is not asked to appoint any one who is not acceptable to him personally. As regards the Ladies of the Household, whose position gave rise to the well-known 'Bed-Chamber Question' in 1839,<sup>2</sup> the arrangement seems to be that 'the Mistress of the Robes', who is only an attendant on great occasions, changes with the Ministry. 'The Ladies in Waiting who, by virtue of their office, enjoy much more of personal contact with the Sovereign, are appointed and continue in their appointments without regard to the political connexions of their husbands.'<sup>3</sup>

The holders of important political offices who oppose, or do not support, the Ministry in matters which are not treated as open questions<sup>4</sup> are liable to dismissal, not, as formerly, in proof of royal confidence, but as a matter of necessity in transacting the business of government.

At the present day such questions could only arise where administrative policy or practice is concerned. A minister who voted against his party in a division for which the Government Tellers were employed would, by convention, place his resignation in the hands of the Prime Minister as soon as he had determined on his course of action.

Moreover, when it is said that the Prime Minister has the power of dismissing his colleagues, no more is meant than this, that he can say to the King, 'He or I must go'.<sup>5</sup> We get a good illustration of this in the dismissal of Lord Chancellor Thurlow in May 1792, after raising a sudden opposition to a Government measure in the House of Lords which nearly brought about its rejection. Pitt wrote to tell him that it was impossible for the King's service to be 'any longer carried on to advantage while your Lordship and myself both remain in our present situations', and wrote in the same sense to the

<sup>1</sup> *Parl. Deb.*, 3rd Ser. xlvi. 1001. See p. 157, post. Cf. Lee, *King Edward VII*, ii. 446.

<sup>2</sup> *Parl. Deb.*, 3rd Ser. xlvi. 983, 985, 987.

<sup>3</sup> Gladstone, *Gleanings of Past Years*, i. 40.

<sup>4</sup> e.g. female suffrage in the Asquith Ministry; Oxford, *Fifty Years of Parliament*, ii. 125; protective tariffs in the Ministry of 1931.

<sup>5</sup> When the Prime Minister and the Sovereign agree against the majority of the Cabinet the action to be taken must depend on circumstances; ultimately the deciding issue must be the probability of securing a majority in the Commons either without or with a dissolution, as in 1931.

King. The King at once desired Dundas, the Home Secretary, to wait on the Lord Chancellor, and inform him that, having to decide between the two, he must call upon Thurlow to give up the Great Seal.<sup>1</sup>

In the case of Lord Palmerston in 1851, the Prime Minister was well aware that Queen Victoria disapproved, as he did, of the communications made by Lord Palmerston to M. Walewski in London and to Lord Normanby in Paris expressing approval of the *coup d'état* of December 1851. Lord Palmerston had made these important declarations of policy without consulting his colleagues in the Cabinet. Lord John was therefore 'most reluctantly compelled to come to the conclusion that the conduct of Foreign Affairs can no longer be left in your hands to the advantage of the country'.<sup>2</sup>

It may be said that the strength of a Prime Minister's position may be tested not only by his power of dismissing a colleague, but by his ability to withstand the weakening of his Government by the retirement of important members of the Cabinet.

The strength of Pitt's Ministry was unaffected by the dismissal of Thurlow, but that of Lord John Russell did not long survive the dismissal of Palmerston.

The resignation by Lord Althorp of the office of Chancellor of the Exchequer and of the leadership of the House of Commons in 1834 brought about the retirement of Lord Grey, and, though Lord Althorp resumed these duties under Lord Melbourne, yet when, within a few months, he succeeded to a peerage the Ministry was so weakened that Lord Melbourne could suggest no course satisfactory to the King, and Sir Robert Peel was sent for, but the Ministry was not technically dismissed.<sup>3</sup>

Mr. Balfour's Cabinet survived, for more than two years, the retirement of five important members,<sup>4</sup> but it was so far weakened that, except in the direction of Foreign Affairs, little

<sup>1</sup> Stanhope, *Life of Pitt*, ii. 148–50.

<sup>2</sup> Walpole, *Life of Lord J. Russell*, ii. 173.

<sup>3</sup> See pp. 51, 52.

<sup>4</sup> Mr. Balfour on this occasion caused adverse comment by suppressing the resignation of Mr. Chamberlain from his colleagues, thus inducing certain resignations; see Oxford, *Fifty Years of Parliament*, ii. 14–16; A. Fitzroy, *Memoirs*, i. 149–58.

serious work, legislative or administrative, could be entered upon.

On the other hand, Mr. Gladstone's Government of 1880 was little affected by the resignation in 1881 of Mr. Forster,<sup>1</sup> who, as Irish Secretary, was responsible for the department the affairs of which excited most attention at the moment; nor was Lord Salisbury's Government of 1886 shaken by the retirement of Lord Randolph Churchill,<sup>2</sup> at that time the most prominent figure in the Conservative party. Mr. Lloyd George's Ministry survived the loss of Dr. Addison in 1921 and of Mr. Montagu in 1922. That of Mr. MacDonald lost without immediate injury in 1932 Sir H. Samuel, Sir A. Sinclair, and Lord Snowden. There seems to be no doubt, for reasons which we will mention later, that the vitality of Governments is stronger now than heretofore, and that a Prime Minister is more absolute, and more capable of dispensing with the service of distinguished colleagues, than was the case before the latest Acts for the extension of the franchise and redistribution of seats. There is, however, a complication induced by the necessity of Coalition Governments, as from 1915 to 1922, and again since 1931.

It is said, and truly, that the Prime Minister is unknown to the law; no salary is attached to the office, if office it can be called; the term does not occur in any Act of Parliament, save in the Chequers Estate Act, 1917, nor in the records of either House. In two formal documents only does he find place. Lord Beaconsfield described himself in the Treaty of Berlin as Prime Minister of England; and on 2 December 1905 the King by sign-manual warrant gave to the Prime Minister place and precedence next after the Archbishop of York.<sup>3</sup> He has 10 Downing Street and Chequers as official residences.

### *The Relations of the Cabinet to the Crown*

The King's servants are entitled to his full confidence, and this means first that he should not take advice from others, in matters of State, unknown to them; next, that he should

<sup>1</sup> Viscount Gladstone, *After Thirty Years*, p. 276.

<sup>2</sup> Letters of Queen Victoria, 3rd Ser. i. 232, 233, 255.

<sup>3</sup> Oxford, op. cit. ii. 184; Lee, *King Edward VII*, ii. 443, 444.

not give public expression to opinions on matters of State without consulting them; and lastly, that he should accept their advice when offered by them as a Cabinet, and support them while they remain his servants.

(1) The correspondence between William IV and Lord Grey affords some useful illustrations of these propositions, for William IV, with excellent intentions, was impulsive and unversed in the rules and practice of constitutional government. The Duke of Wellington addressed the King directly on the subject of the arming of political societies at a time when the excitement occasioned by the Reform Bill caused some anxiety as to the maintenance of order. The King replied, and the Cabinet, though assured that his correspondence with the Duke did not indicate any want of confidence in them, remonstrated through the Prime Minister. Lord Grey writes that 'it might produce inconvenience if His Majesty were to express opinions to any but his confidential servants in matters which may come under their consideration'.<sup>1</sup> The King promised that in future he would merely acknowledge such communications.

Queen Victoria departed from this principle, when in 1894 she went so far as to consult Lord Salisbury, Sir H. James, and others, on the policy of securing a dissolution on the issue of the House of Lords.<sup>2</sup>

(2) On the occasion of Sir C. Grey being sworn of the Privy Council as a member of the Canadian Commission, William IV made a short speech in which he referred, unmistakably and in terms of severity, to advice received from the Colonial Secretary. The Cabinet remonstrated with the King for having done that which might 'have the effect of hereafter restraining the freedom of that advice which it is the duty of every one of your Majesty's confidential servants to offer to your Majesty without reserve'.

<sup>1</sup> *Corresp. of Will. IV and Lord Grey*, i. 413–24.

<sup>2</sup> *Letters*, 3rd Ser. ii. 296, 341 ff. Lord Rowton acted as intermediary (cf. A. Fitzroy, *Memoirs*, i. 166 f.) A different position arises when the Prime Ministership is vacant; *ibid.* 368. Edward VII in Oct. 1909 seems to have obtained an opinion on the issue of the Lords and the budget from Lord Cawdor without advice, but he received Mr. Asquith's agreement to his seeing Lord Lansdowne and Mr. Balfour; Lee, *King Edward VII*, ii. 667–8. Cf. for George V in 1911, Newton, *Lord Lansdowne*, p. 409.

(3) The third proposition is not so easy to illustrate. A Sovereign of this country either accepts the advice of his Ministers in any matter to which they attach importance, or must dismiss them. But there are many ways in which the influence of the Crown may be used to assist the Ministry of the day. In domestic affairs we know how important was the effect on the passing of the first Reform Bill of the communications addressed by William IV to the opponents of the Bill in the House of Lords; and the efforts of Queen Victoria contributed to bring about a settlement of the threatened dispute between the two Houses in the case of the Disestablishment of the Irish Church<sup>1</sup> and redistribution in 1884.<sup>2</sup> Later her hostility to Gladstone was utterly unconstitutional.<sup>3</sup> In Foreign Affairs the international courtesies of King Edward VII lent valuable aid to the pacific policy of the Foreign Office, but he failed to aid the settlement of the Lords controversy. It is uncertain if he declined to accept Lord Salisbury's views on foreign policy and so secured his resignation in 1902.<sup>4</sup>

The Cabinet, on the other hand, are bound, as is each individual member, to inform the King of all important measures of the executive. William IV expressed surprise and displeasure when he supposed that his ministers had introduced, without his knowledge, a Bill for abolishing capital punishment in certain cases. He was assured that the measure in question was a private member's Bill, and that certain members of the Government had supported it, as they were entitled to do in the legitimate exercise of their private judgment.

The necessity for giving this information to the Sovereign is well illustrated by the circumstances which brought about Lord Palmerston's retirement in 1851, and the memorandum communicated to him by Queen Victoria through the Prime

<sup>1</sup> *Life of Archbishop Tait*, ii. 24, and see *supra*, p. 61, n. 1.

<sup>2</sup> Viscount Gladstone, *After Thirty Years*, pp. 360–5.

<sup>3</sup> Gladstone, op. cit., pp. 116 f., 337 ff., 371 f.; the secret communications with Beaconsfield (pp. 337 f., 356, 358 f.) were clearly unconstitutional; her invariable opposition to home rule is shown, ibid. 387–423. She was equally unconstitutional in regard to House of Lords reform as against Rosebery; *Letters*, 3rd Ser. ii. 384 ff., 429 ff.

<sup>4</sup> Lee, *King Edward VII*, ii. 158 f.

Minister as to the duty of the Secretary of State for Foreign Affairs.<sup>1</sup> It was in these words:

'The Queen requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to a measure, that it be not arbitrarily altered or modified by the Minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister. She expects to be kept informed of what passes between him and the foreign ministers, before important decisions are taken, based upon that intercourse ; to receive the foreign dispatches in good time, and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off.'

Briefly, one may say that the King is entitled to be informed of all important executive or legislative measures which have so far ripened towards action as to have come before the Cabinet for discussion. A very strong view of her rights in this matter was held by Queen Victoria, who censured Lord Rosebery for alleged failure to consult her before urging in public the policy of reform of the Lords.<sup>2</sup>

Suggested changes in administration may begin in so vague and tentative a manner that it is hard to say at what point communication with the King becomes imperative. It is clear that the negotiations which Addington conducted with Pitt in 1804 went farther than George III considered to be justifiable, and it would certainly seem right that when the confidential servants of the Crown contemplate a change in the character of the administration, the Sovereign should have early knowledge of the matter. Queen Victoria was offended, not without reason, when, in 1886, Lord Randolph Churchill communicated his resignation to *The Times* before it was made known to her.<sup>3</sup>

On resignation of office the Prime Minister is not entitled to advise the Crown as to the selection of a successor, unless

<sup>1</sup> *Parl. Deb.*, 3rd Ser. cxix. 90.

<sup>2</sup> *Letters of Queen Victoria*, 3rd Ser. ii. 440, 449. Cf. for Edward VII, Lee, ii. 501.

<sup>3</sup> *Life of Lord Randolph Churchill*, ii. 255.

specially invited to do so. Thus on Gladstone's retirement in 1894 the Queen did not ask his opinion, nor was, it appears, Bonar Law consulted in 1923 regarding a successor.

#### § 4. THE RELATIONS OF THE CABINET AND THE HOUSE OF COMMONS

It remains to consider the relations of the Cabinet with the House of Commons. Here we must be careful lest we apply a theory of the constitution which really corresponded with practice for about fifty years of the middle nineteenth century to periods before the first Reform Bill, and since the last extension of the franchise, when, although the theory is true, it is true in a very different sense.

Without a majority in the House of Commons it is plain that the Cabinet cannot carry the legislation or obtain the supplies which it requires. But in order to determine the relations of the Cabinet to the Commons it is necessary to consider how that majority comes into existence and is kept together.

In applying our theory to the practice of the eighteenth and early nineteenth centuries, we must not allow ourselves to suppose that constituencies were always eager, well-informed, and uncorrupt, that the House of Commons was always really representative of such constituencies, that parties were always well defined, and that the Crown always loyally accepted the decision of the people and of Parliament as to the party which should govern and the men who should guide. Throughout the greater part of the eighteenth century these conditions were inadequately fulfilled. The public was often ill informed and apathetic on political questions: the House of Commons was not representative of public opinion: nomination boroughs and constituencies subject to influence of one sort or another gave a large control over the representation of the House to great landowners, to the Crown, or the Government of the day. Thus it was that, in the absence of political interests and of party divisions based on such interests, an adroit Parliamentary manager might keep a majority together, although, like Walpole, he had fallen under the cordial dislike of the people, or, like Newcastle, had never attracted their attention. For the same reasons it was possible for George III,

who busied himself in matters of patronage and corruption, to make, keep, or destroy a majority for any Ministry.<sup>1</sup>

To enforce joint responsibility upon a body of ministers it is necessary either that the ministers themselves should be effectively agreed on certain lines of policy, and loyal to one another, or that they should represent a party strong enough in the country to enforce its policy upon its nominees. No King who aimed at personal influence would desire that his ministers should represent a compact body of opinion, adverse perhaps to his own. George III, who not only desired to rule, but saw how the apathy of the country and the self-interest of public men made it possible for him to enjoy the reality of power, used every opportunity to break up parties and prevent the formation of strong Ministries. His successors were not so pertinacious or so astute, but the fact remained that, as the electorate was constituted before 1832, almost any Ministry which enjoyed the support of the Crown could command such a majority as would enable it to hold office. The great displays of public opinion at general elections, in 1784, in 1807, and in 1831, all served to confirm in office an existing Ministry. The ultimate legal sanction which the House of Commons can bring to bear on a Ministry of which it disapproves, the refusal to pass the Mutiny Act or grant supplies, has never in fact been applied. The only ministers before the Reform Act of 1832 who resigned in consequence of defeats in the House of Commons were Sir Robert Walpole in 1741, Lord Shelburne in 1783, and the Duke of Wellington in 1830.

We may look at this relation of Cabinet to Commons as it existed before 1832, and again before and since 1885. It should be borne in mind that during the first of these three periods, and indeed for rather longer, it was not expected of a Ministry that they should do more than administer. The defeat which drove Walpole from power took place in a committee of the House sitting to hear an election petition. Shelburne was beaten on a vote of approval of the Peace of Versailles. There is no instance before 1830 of a Ministry retiring because it was beaten on a question of legislation,<sup>2</sup>

<sup>1</sup> May, *Const. Hist.* i. 396 ff.

<sup>2</sup> Chatham was defeated on the Ways and Means of the year and on the

or even of taxation. So late as 1841 Macaulay maintained in the House of Commons, speaking as a Cabinet Minister, that a Government was not bound to resign because it 'could not carry legislative changes, except in particular cases, where they were convinced that without such and such a law, they could not carry on the public service'. Legislation which ministers might need for administrative purposes was the only sort of legislation about which, in the opinion of the Melbourne Cabinet, a Government need feel sensitive.

But, generally speaking, one may say that from 1832 to 1867 a defeat in the House of Commons on what the Cabinet may have chosen to consider a vital issue was the ordinary mode of terminating the existence of a Ministry. Since 1867 there have been fifteen changes of Ministry, apart from those due to resignation through illness as in 1868, 1894, 1902, 1908, and 1923 when the same political party remained in power, and the reconstruction of 1915. On five of these occasions ministers have resigned because they were defeated in the House of Commons; on six, without such defeat, because the verdict of the constituencies at a general election had been given decidedly against them; on four (1905, 1916, 1922, 1931), because the Ministry had lost support in Parliament. It was made a matter of reproach<sup>1</sup> to Lord Salisbury's Ministry in 1892 that, being in an apparent minority of forty on the result of a general election, they did not resign at once, but awaited an adverse vote in the House of Commons; a less just accusation was made in 1924 against Mr. Baldwin. The circumstances under which Mr. Balfour's Ministry retired in 1905 are too peculiar to be likely to form a precedent. A Cabinet weakened by the retirement of five important members, warned by the result of frequent by-elections that

proposed land tax, and Pitt on commercial policy with Ireland, Parliamentary reform, and national defence; these defeats were not treated as grounds for resignation; Massey, i. 307; Stanhope, *Life of Pitt*, i. 254, 272, 275, 288. Liverpool was defeated on the property tax and the Bill of Pains and Penalties against Queen Caroline; Wellington on a motion for repeal of the Test and Corporation Acts. Todd (*Parl. Government in England*, i. 253 ff.) tabulates the causes of the fall of ministries since 1782. See also Emden, *The People and the Constitution*, pp. 320-6.

<sup>1</sup> Oxford, *Fifty Years of Parliament*, i. 199, does not complain of the delay as against the precedents of 1864, 1874, and 1880. So also in 1886, 1924 (Nov.), and 1929 resignation followed on the election results.

it had lost the confidence of the country, conscious of divisions of opinion among its supporters on a serious question of economic policy, retained a majority of seventy to eighty, which enabled it to live through the Sessions of 1904 and 1905. During the recess Mr. Balfour resigned, mainly on the ground that he had no legislative programme to lay before Parliament in the ensuing Session. His opponents accepted office without hesitation, formed a Ministry, and dissolved Parliament. The results of the general election which ensued indicate that a Government which is conscious of failing popularity does better to accept defeat in the House of Commons, or to appeal to the country on its own account, than to follow the course adopted in 1905.<sup>1</sup> Mr. Lloyd George resigned in 1922 because the Conservatives had repudiated his leadership. In 1931 Mr. MacDonald resigned because he had with the King's consent arranged a coalition to restore the national finances.

The conditions under which Mr. Balfour's Government retained office during the years 1903, 1904, 1905 raise an interesting question as to the present relations of the Cabinet to the Commons. It is true to say that in the last 100 years the power which determines the existence and extinction of Cabinets has shifted, first from the Crown to the Commons, and then from the Commons to the electorate. But it is no longer true that the House of Commons is always a close reflection of the opinion of the country, or that it responds to changes of public opinion as they may occur during the existence of a Parliament. This was very clearly revealed by the contrast between the feeling of the country in 1931 and that of the House of Commons which rendered a general election essential for the National Government.

The causes of these changes are various. Before 1832 the Crown and its servants could exercise considerable influence on the composition and conduct of the House of Commons. The Reform Act of 1832 was an attempt to make the House at once independent and representative, to distribute political power in correspondence with the conditions of the time, and to give representation to the great centres of industry as well

<sup>1</sup> Oxford, op. cit. ii. 7-35; Lee, *King Edward VII*, ii. 186-91; the King deprecated his decision, suggesting that he should meet Parliament.

as to the smaller boroughs and rural counties. Holding to the principle that representation should be local, and the voter a person of substance, the framers of the Bill made the House a fair representation of the middle classes. The result as it worked out between 1832 and 1886 was to give to the House a greater share of political power than it possessed before that date, or possesses now.

The present conditions are attributable primarily to the distribution of political power in the extended electorate by the creation of single-member constituencies, and to the development of party organization. Before the legislation of 1885 the constituencies for the most part returned two members, political organization was not fully developed, and there was greater opportunity for the representation of variety of opinion. The creation of the single-member constituency under existing political conditions has gone far to destroy the local character of our representative system, and the independence of the individual member.

When a constituency returned two members the elector had the choice of varieties of opinion even among members of the same party: under the present system, and with the increased strength of political organization, a candidate offers himself, not so much on his own merits, as because he is the nominee of the political association or caucus which professes to represent his party, and because he undertakes to support a given programme and the leaders of the party.

Labour representatives are formally pledged to support of their party to which they owe their seats; candidates of other parties are in many cases at least obliged to their party funds for their electoral costs.

The result is that an important division in the House of Commons, before 1832, represented very often the personal views of those who owned or controlled constituencies, since 1886 it represents the directions of external party organization. Between those dates a member enjoyed a greater freedom of judgement in the exercise of his vote, and hoped to justify his action to his constituency.

Modern rules of procedure give to the Government of the day a large control over the time of the House for the purposes of its own business, while the introduction of the closure

leaves the time for discussion of a Government measure very largely in the hands of the Government. Yet another element in the situation is that a slight but widely diffused change of political sentiment may, acting on the enormous constituencies of the present day, change the character of the House of Commons, and give to one of two parties a majority large beyond all proportion to the numerical majority of votes cast for them throughout the country.

The consequence of these various features of our political life at the present time is to make the House of Commons dependent on the Cabinet rather than the Cabinet on the Commons. The threat of a dissolution suggests to the supporters of a Ministry the certainty of expense and the possibility of defeat, and this possibility may assume a more formidable aspect if by-elections have resulted unfavourably to the Government. Now that the Crown will act without hesitation on ministerial advice, such a threat, issuing from the Prime Minister as representing the collective wisdom of the Cabinet,<sup>1</sup> may secure the continued loyalty of a majority in the House of Commons long after the composition of the House has ceased to correspond with the political opinion of the country. A member may have ceased to be in sympathy with the leaders of his party, but he may also feel that, small as will be his chances of re-election in any event, they would disappear altogether if he broke the bonds of party allegiance. In truth the Redistribution of 1885, as perpetuated in 1918, has done much to destroy the independence of the members of the House of Commons. The power and influence which it has lost has gone partly to the Cabinet, partly to the constituencies, or rather, in many cases, to the organizations by which the constituencies are worked.

#### § 5. THE IMPERIAL DEFENCE COMMITTEE AND THE WAR CABINET

The Imperial Defence Committee will be dealt with under the head of the Armed Forces of the Crown, but it should be mentioned here. It is not a Council of the Crown ; it is a rather

<sup>1</sup> The Prime Minister cannot act save on Cabinet consultation ; Oxford (*Fifty Years of Parliament*, ii. 194-6) shows action in this way in all cases from 1868 to 1910. Mr. Balfour, in 1905, gradually won over his colleagues to resignation.

exceptional Committee of the Cabinet; it has no executive power. The Prime Minister is chairman, its members such persons as he may summon; 'it practically never meets without having the assistance of the Secretary of State for War, the First Lord of the Admiralty, the head of the Army General Staff, the head of the Army Intelligence Department, the First Sea Lord, and the head of the Naval Intelligence Department'.<sup>1</sup> To these must be added now the Secretary of State for Air, and the Chief of the Air Staff, and the President of the Council. Other persons may be summoned if the business under discussion needs their advice, as, for instance, the Foreign, Dominion, Colonial or Indian Secretaries, the Chancellor of the Exchequer, or representatives of the self-governing Dominions.<sup>2</sup> The Permanent Under Secretary of State for Foreign Affairs, and the Permanent Secretary to the Treasury are usually in attendance. Records are kept of the proceedings of this Committee, and for this purpose it possesses a permanent Secretary; these features at once distinguished it from the pre-War Cabinet. It exists for the purpose of framing and recording the best advice obtainable on questions of Imperial Defence for the benefit of the departments concerned. The relations of this Committee to the Cabinet have sometimes been misunderstood, as also its powers and duties, and for this reason we mention it here. Incidentally its existence adds to the many labours of the Prime Minister, who habitually takes the chair at its meetings.

The Committee is historically of particular interest because its Secretariat was the model and nucleus for the Cabinet Secretariat, and because its imperial aspect suggested the creation of the Imperial War Cabinet to supplement the activities of the British War Cabinet. The latter was evolved under the pressure of circumstances in 1916 to secure concentration on the conduct of hostilities in a manner which in the view of Mr. Lloyd George was impossible under the conditions of an ordinary Cabinet.<sup>3</sup> For the comparatively brief

<sup>1</sup> *Parl. Deb.*, 4th Ser. cxxxix. 619. See also pt. ii, ch. x, *post*.

<sup>2</sup> Speeches of Mr. Balfour on 2 Aug. 1904 and 11 May 1905. *Parl. Deb.*, 4th Ser. cxxxix. 68; cxlvii. 62. See also Lord Londonderry, House of Lords, 14 March 1934.

<sup>3</sup> On the causes of its creation see Addison, *Politics from Within*, vol. i, ch. xviii.

period of its duration<sup>1</sup> it was composed of from five to seven members, one of whom, Mr. Bonar Law,<sup>2</sup> acted as the connecting link between the Cabinet and the House of Commons while the others concentrated their attention on the direction of war activities as a whole. By a striking innovation, General Smuts, though not a member of the Imperial Parliament, was invited to act as a member of the War Cabinet. Apart from his individual appointment, the Dominion Prime Ministers in 1917 and 1918 were invited to sit with the British War Cabinet as an Imperial War Cabinet,<sup>3</sup> a rather anomalous institution. It was a Cabinet of Governments, in Sir R. Borden's phrase, without collective responsibility and therefore without a Prime Minister, in which no decisions could be taken by majority voting. On the other hand, as the naval and military forces of the Dominions were under the control of the British Government by decisions of the Dominions, the plan provided an effective means by which the Dominions could share in the taking of the decisions which affected the control of war operations. At the armistice the Imperial War Cabinet was virtually transformed into the British Empire Peace Delegation at Paris. After the conclusion of the Treaty of Versailles, it may be said to have expired, for an attempt in 1921 to treat the Conference of that year as virtually an Imperial Cabinet was without success.<sup>4</sup>

During the War there existed in theory no other Cabinet. In practice something akin to a Cabinet for Home Affairs had to be developed, for much that was essential for the country was left undone by the War Cabinet. After the close of hostilities the demand for reversion to the normal type of Cabinet became vocal and had to be accepted.<sup>5</sup> Lord Haldane's Committee,<sup>6</sup> which had studied governmental reform, reported in favour of the reduction of the size of the Cabinet and the relief of its members from administrative duties,

<sup>1</sup> Dec. 1916 to Oct. 1919.

<sup>2</sup> He alone, as Chancellor of the Exchequer, had executive responsibilities.

<sup>3</sup> *Parl. Pap.*, Cd. 9005 (1918); Cmd. 325 (1919); Keith, *War Government of the British Dominions*, pp. 27-35.

<sup>4</sup> Keith, *Responsible Government in the Dominions*, ii. 1193-7.

<sup>5</sup> The Cabinet for Home Affairs is now represented by the Home Affairs Committee of the Cabinet mentioned above (p. 133).

<sup>6</sup> *Parl. Pap.*, Cd. 9230.

leaving them to plan national development in all its aspects, but the project never bore fruit.

#### IV. THE HOUSE OF LORDS AND THE PRIVY COUNCIL AS COUNCILLORS OF THE CROWN

##### § 1. THE HOUSE OF LORDS

The House of Lords is still, in theory, a Council of the Crown. The peers have never been summoned in this capacity since 1688, but their historical rights are preserved in two ways.

The writ of summons addressed to the temporal and spiritual peers is a call 'to treat and give council'; the judges and law officers are summoned to attend them; whereas the Commons, before the Ballot Act reduced the writ to a form, were summoned to 'do and consent to such things, as by the said Common Council . . . shall happen to be ordained'.<sup>1</sup>

It is the privilege of each individual peer to have audience of the Sovereign. Such a right was freely exercised in the eighteenth century, when parties were less coherent, members of Cabinets less loyal to one another, and the King more ready to listen to advice given to him by others than his responsible ministers. At the present day a peer would hesitate to offer counsel to the Crown on any matter which fell within the province of the Ministry of the day. In the Rosebery Ministry we find Lord Rowton<sup>2</sup> advising the Queen in a manner which cannot be held constitutional, although in law no doubt the King has a right to demand, and any peer, whether of the United Kingdom, of Scotland or of Ireland, has a right to offer, counsel on matters which are of importance to the public welfare.<sup>3</sup>

##### § 2. THE PRIVY COUNCIL

The Privy Council, as such, has ceased to be a Council of the Crown. It meets for the purpose of making Orders, issuing Proclamations, or attending at formal acts of state, such as the admission of a minister to his office or the render-

<sup>1</sup> Vol. i: *Parliament*, pp. 50 f., 62.

<sup>2</sup> *Letters of Queen Victoria*, 3rd Ser. ii. 296; A. Fitzroy, *Memoirs*, i. 166.

<sup>3</sup> The right is to go singly, and the application for such an audience is made through an officer of the household, not through the Secretary of State; *Diary of Lord Colchester*, iii. 604.

ing of homage by a bishop for the temporalities of his see. The Cabinet has acquired the place which the Council once held as the adviser of the Crown.

Some part of its earlier duties in this respect survive in the Committees of the Privy Council. At present there are, besides the Judicial Committee, five Standing Committees of the Council, but only one of these, the Committee for business relating to the Channel Islands, represents the old Standing Committees appointed by the King in Council at the commencement or in the course of his reign.<sup>1</sup> The Judicial Committee is a statutory Court of Final Appeal from all parts of the King's Dominions outside the United Kingdom.<sup>2</sup> The two Committees which are constituted respectively for the Universities of Oxford and Cambridge<sup>3</sup> and for the Scottish Universities<sup>4</sup> are also the creations of Statute. There is also a Committee for the grant of charters to municipal corporations<sup>5</sup> and one on the baronetage.

But the form of advice and counsel is maintained. The Judicial Committee of the Privy Council when it gives judgment presents no conflicting views but with apparent unanimity 'humbly advises His Majesty' that an appeal should be allowed or dismissed, or a judgment varied, and effect is given by Order in Council. As a matter of form it is the rule that no member of the committee which advises is summoned to the Council at which the order is made.

A Committee for Trade and Plantations used to advise other departments of government on matters affecting commerce or colonial relations: it was revived in 1849 to advise on new constitutions for Australia and South Africa; and Committees of the Privy Council are appointed from time to time for various purposes of inquiry.

The main business of the Privy Council must therefore be dealt with in the next chapter, for it is important to distinguish the duty of settling policy and advising action accordingly from the duty of actual administration in the various departments of State.

<sup>1</sup> The Committee for Trade and Plantations rests on an Order in Council of 23 Aug. 1786. See p. 206, *post.* <sup>2</sup> 3 & 4 Will. IV, c. 41.

<sup>3</sup> 40 & 41 Vict. c. 48, s. 46.

<sup>4</sup> 52 & 53 Vict. c. 55, s. 9.

<sup>5</sup> Local Government Act, 1933, ss. 129, 130.

But, since the advisers of the Crown are necessarily Privy Councillors, it would be well here to speak of the mode of appointment and dismissal of a Privy Councillor, and of any special matters appertaining to his *status*.

The Privy Councillor is nominated by the King;<sup>1</sup> he takes the oath of office and the oath of allegiance and kisses the King's hand at a meeting of the Council.

The oath<sup>2</sup> of office is as follows:

'You shall swear to be a true and faithful Servant unto the King's Majesty, as one of His Majesty's Privy Council. You shall not know or understand of any manner of thing to be attempted, done, or spoken against His Majesty's Person, Honour, Crown, or Dignity Royal; but you shall lett and withstand the same to the uttermost of your Power, and either cause it to be revealed to His Majesty Himself, or to such of His Privy Council as shall advertise His Majesty of the same. You shall, in all things to be moved, treated and debated in Council, faithfully and truly declare your Mind and Opinion according to your Heart and Conscience; and shall keep secret all Matters committed and revealed unto you or that shall be treated of secretly in Council. And if any of the said Treaties or Councils shall touch any of the Counsellors, you shall not reveal it unto him, but shall keep the same until such time as, by the Consent of His Majesty, or of the Council, Publication shall be made thereof. You shall to your uttermost bear faith and allegiance unto the King's Majesty: and shall assist and defend all jurisdictions, pre-eminentes and authorities granted unto His Majesty and annexed to the Crown by Acts of Parliament or otherwise, against all Foreign Princes, Persons, Prelates, States or Potentates. And generally in all things you shall do as a faithful and true Servant ought to do to His Majesty. So help you God and the Holy Contents of this Book.'

An affirmation may now be substituted for the oath.<sup>3</sup>

No formality beyond this is required for the appointment of a Privy Councillor, and none for his dismissal; it is enough for this purpose that the King should send for the Council book and strike his name off the list of the Privy Council, as

<sup>1</sup> The Prime Minister advises; cf. S. Salvidge, *Salvidge of Liverpool*, p. 247 f. Queen Victoria objected to give membership to artists; *Letters of Queen Victoria*, 3rd Ser. iii. 167.

<sup>2</sup> *Parl. Pap.*, 1867, xxxi. 84. The form of 1257 is the earliest known; Baldwin, *The King's Council*, p. 345. That of 1570 is given in Tanner, *Tudor Const. Doc.*, p. 225.

<sup>3</sup> 51 & 52 Vict. c. 46.

in the case of Fox on Pitt's advice in 1792; he was restored in 1806 on Grenville's recommendation. In 1921 the removal of Sir E. Speyer's name was approved by Order in Council.<sup>1</sup> The demise of the Crown formerly dissolved the whole Council in six months from the date of the demise, unless the new Sovereign should reappoint the Council of his predecessor. The Demise of the Crown Act<sup>2</sup> provides that the death of the Sovereign does not affect the tenure of office held under the Crown.

The members composing the Privy Council may be said to fall into three groups. Members of the Cabinet and normally Dominion Prime Ministers must be made members of the Privy Council as the confidential advisers of the Crown. Beyond these there are great offices, such as the Lords of Appeal in Ordinary, the Lord Chief Justice, the Lords Justices of Appeal, and the Archbispopries,<sup>3</sup> which, though unconnected with politics, are usually associated with a place on the Council Board. Beyond these again is a group of persons eminent in political life or in the service of the Crown, or occasionally in science or letters, upon whom the rank of Privy Councillor is conferred as a complimentary distinction.<sup>4</sup>

Until 1870 an alien born could not become a member of Parliament or of the Privy Council though naturalized. This disqualification was imposed by the Act of Settlement, and difficulties in removing it, even by Statute, were added by 1 Geo. I, c. 4. Thus in order that naturalization might confer political rights in an individual case, it was necessary to repeal that Act for the purposes of that case, before a bill could be brought in to remove the statutory disability created by the Act of Settlement. The Naturalization Act of 1870, as re-enacted in 1914, confers upon naturalized persons the full political rights of a British subject, and the distinction between citizens by birth and naturalization is abolished so far as political rights are concerned.<sup>5</sup>

<sup>1</sup> For the reason of the change in procedure see A. Fitzroy, *Memoirs*, ii. 768, 770.

<sup>2</sup> 1 Ed. VII, c. 5.

<sup>3</sup> The Archbishops claim membership by prescription.

<sup>4</sup> The view that a king's son is a Privy Councillor by birth, during his father's lifetime, and does not need to be sworn (*Greville Memoirs*, iv. 274) is incorrect; A. Fitzroy, *Memoirs*, ii. 722. But he and near relatives may be introduced without oath; Todd, *Parl. Govt.* ii. 55.

<sup>5</sup> R. v. Speyer, [1916] 2 K.B. 858; 4 & 5 Geo. V, c. 17, s. 3 (2).

The members of the Privy Council, like the judges of the High Court of Justice, are in the Commission of the Peace for every county. The right of the Privy Council, or of a Committee of the Council, or of individual members, to commit persons to prison seems to have been practically settled by this arrangement, and is limited by the security which the Habeas Corpus Acts supply, that a prisoner shall not be detained without the opportunity of speedy trial, bail or discharge. Thus the questions, which once were of interest,<sup>1</sup> concerning the right of a Privy Councillor or of the collective Council to commit to prison are answered, and need no further discussion here.

<sup>1</sup> In the Seven Bishops' case much argument was expended on the legality of the commitment by the lords of the Council, because it was not alleged in the warrant that the commitment was by the Privy Council, but only by certain lords. The right of the collective Council to commit for misdemeanour seems to have been admitted, and, equally, that an individual councillor could not so commit; 12 St. Trials, 183. See also *Darnel's Case* (1627), 3 St. Tr. 1; 3 Car. I, c. 1.

## CHAPTER III

### THE DEPARTMENTS OF GOVERNMENT AND THE MINISTERS OF THE CROWN

WE have traced the history of the Councils of the Crown to their issue in the Cabinet of the present day, dependent for its existence upon the continued support of Parliament and the electorate.

But the Cabinet is not the *executive* in the sense in which the Privy Council was the executive. The Cabinet shapes policy and settles what shall be done in important matters, whether foreign or domestic, and it consists mainly of the heads of great departments of government, but it is not therefore the executive.

It is the King in Council who gives orders that certain things shall be done. The Cabinet advises the King that war be declared with a foreign power, the Foreign Secretary in the name of the King recalls our representative at the Court of that power, the King in Council proclaims the declaration of war. The Cabinet decides that ships or troops shall be sent here or there; the First Lord of the Admiralty or the Secretary of State for War or Air gives the necessary orders. The Cabinet decides that the King shall be advised to dissolve Parliament, the King in Council proclaims the dissolution of Parliament and the summons of a new one, the Chancellor issues the writs which bid the peers to attend and the constituencies to elect representatives.

The Cabinet is the motive power in our executive. The decisions of the Cabinet and the advice thereupon tendered to the Crown bring into action the departments of government concerned. Of these and of the ministers who supervise them we must now treat.

#### I. THE GROWTH OF DEPARTMENTS OF GOVERNMENT

##### § 1. THE OFFICES OF THE HOUSEHOLD

The ministers of the Crown represent a more universal requirement of royalty than do the Councils of the Crown,

for every King must have ministers to maintain the dignity of his household, to assist in the transaction of his business.

Official life may be said to begin with the King's Household. The chamberlain, the steward, the horsthegn or marshal, and the cupbearer or butler, are the necessary ministers of the Teutonic court<sup>1</sup> in England and on the Continent: and the Norman King had his Lord High Steward, his Lord Great Chamberlain, his Constable and his Marshal.<sup>2</sup>

On these it is not necessary to dwell, nor to trace their history down to the present time. Shortly it may be said that these great offices became hereditary and honorary,<sup>3</sup> and then were duplicated in order that their work might be done. The Lord Great Chamberlain survives, as does the Earl Marshal, the head of the College of Arms. The Lord Great Chamberlain has the charge of the King's Palace at Westminster, and retains authority over the buildings of both Houses of Parliament when the Houses are not sitting.<sup>4</sup> Both officers discharge certain honorary duties at a coronation.<sup>5</sup>

A Lord High Steward is appointed for the purpose of presiding at the trial of a peer for treason or felony, and formerly was appointed also for the ceremonial of a coronation.

But there is a Lord Steward, as also a Lord Chamberlain and a Master of the Horse; they have functions in the King's Household at the present day, and the Lord Chamberlain is also a censor of plays, and of theatrical management. These were, as we have seen, Cabinet offices in the last century, before 1782, and until 1924 they were still political offices in so far as they changed hands, with other places in the Household, on a change of government.<sup>6</sup> Since Mr. Mac-

<sup>1</sup> Stubbs, *Const. Hist.* i. 343.

<sup>2</sup> Ibid. i. 354.

<sup>3</sup> Ibid. i. 345.

<sup>4</sup> See *Journal of Speaker Denison*, p. 215, and *Report on the Presence of the Sovereign in Parliament*, 1901.

<sup>5</sup> But in 1902 the Lord Great Chamberlain was not assigned duties in this regard; A. Fitzroy, *Memoirs*, i. 54, 71, 76.

<sup>6</sup> These offices were (Todd, *Parl. Govt.* ii. 163, 164):

The Lord Steward of the Household.	The Captain of the Gentlemen at Arms.
The Lord Chamberlain.	The Captain of the Yeomen of the Guard.
The Vice-Chamberlain.	The Master of the Buckhounds.
The Master of the Horse.	The Chief Equerry.
The Treasurer of the Household.	The Clerk Marshal.
The Controller of the Household.	The Lords in Waiting.

Donald's Government in 1924 most of these offices have been left in the King's hands. Three offices, those of Vice-Chamberlain, Treasurer, and Controller of the Household, are still held by members of the House of Commons who, together with the Junior Lords of the Treasury, act as Whips for the Government of the day, and four Lords in Waiting change with the Ministry.

The Chamberlain, however, needs a fuller notice. This officer was originally responsible for the administration of the Royal Household. His office was therefore one of financial importance. Of this indications are afforded in the fact that in Saxon times the words *hordere* or *thesaurarius* were synonyms for the Chamberlain;<sup>1</sup> in the fact that some portions of the Norman King's revenues were not paid into the Exchequer but *in camera regis*;<sup>2</sup> in the frequent and elaborate ordinances for the regulation of the Royal Household; in the constant demand of the medieval Parliaments that 'the King should live of his own', that the Chamberlain among other officers of State should be nominated in Parliament.

So when the office became hereditary and titular there was need of a real minister to do its work; this was the King's Chamberlain, represented at the Exchequer by two *camerarii*. The duties of these Chamberlains of the Exchequer became merely formal after the reign of Henry VII, but the King's Chamberlain retained his importance.

He was not merely concerned with the economy of the King's Household; he was a medium of communication between King and Council, and occasionally endorsed petitions which the King had signed, or carried them with his instructions to the Secretary of State.<sup>3</sup> In the Statute of Precedency he ranks above the King's secretaries.<sup>4</sup>

As late as the reigns of William III and Anne the office was filled by statesmen of the first rank, by Shrewsbury and Sunderland in the reign of William, by Shrewsbury in the

<sup>1</sup> Kemble, *Saxons in England*, ii, c. 3.

<sup>2</sup> Report on Public Income and Expenditure, 1869, p. 341. Cf. Tanner, *Tudor Const. Doc.*, pp. 621, 622, as to the usage under Henry VII and Henry VIII, and for early history, Tout, *Charters*, iv. 227-348.

<sup>3</sup> Nicolas, vi, pp. ccxiv, cxxiii; Ordinance of 1443. See Baldwin, *The King's Council*, pp. 157, 284.

<sup>4</sup> 31 Hen. VIII, c. 10, s. 4.

reign of Anne. But from this time forth, although the office was long regarded as one of Cabinet rank, it ceased to be held by persons of such political eminence.

### § 2. THE POLITICAL OFFICES

In the management of the King's Household we find the beginning of the departments of government. But, as the business of the kingdom increases, the keeper of the treasure, which is expended on national purposes, becomes an official distinct from the Chamberlain and Steward, who receive and expend the funds by which the Royal Household is maintained. The secretarial business is transacted by the chief of the royal chaplains, who in the reign of Edward the Confessor becomes the Chancellor. The Saxon King seems to have needed a great officer to act as his deputy or representative, and the Norman King of necessity appointed some one to act on his behalf when he was absent in France. Hence arises the Justiciar, whose name indicates the constant unresting activity of the Norman Kings in enforcing the justice of their courts, and in asserting their peace as against the justice and the peace of localities and great lords of lands. Thus side by side with the officers of the King's Household arise officers for the conduct of national business. These fall at first into three groups: the administration of the King's justice and maintenance of the King's peace; the account, receipt, and issue of the King's treasure; the communication of the King's will expressed individually or in Council.

Throughout the greater part of our history the only organized department for the defence of the nation is the Admiralty; feudalism, and the institutions which grew out of feudalism, supplied the place of an organized military system for offence and defence; the War Office has grown up as Parliament slowly recognized the need of a standing army, and the King as slowly surrendered his prerogatives in respect of military command. The union with Scotland, the union, now in part dissolved, with Ireland, the growth of the Colonies and protectorates, and the acquisition of India, have created new needs for organized administration, while the increased activity of the State has established

We propose in this chapter to deal with the history and constitution of these various departments, leaving to a separate chapter the administration of justice and the constitution of the Courts, and dealing briefly with some departments, which must be further discussed later.

It is impossible to arrange the subject-matter on any logical basis which also would be convenient to follow. Some functions are of primary importance, the original *executive* functions of maintaining internal order and external defence; others are *regulative*, being concerned with the promotion actively of social and economic welfare.

This division, however, is not exhaustive, nor is the distinction always easy to substantiate. It seems better to treat these offices historically, and to group them according to their origin. Regarded thus they fall into four groups.

(1) Two great offices, both of high antiquity, are now always placed in commission, the office of Lord High Treasurer and that of Lord High Admiral.

(2) The Secretariat in a wide sense includes all those offices which take their origin in the custody of the royal seals and the formal communication of the King's pleasure. The Chancellor, the Lord Privy Seal, and the Secretaries of State fall into this group.

(3) In the next group we must place the Privy Council—for many purposes the formal executive of the country—and all those Boards which once were Committees of the Council, and which still, by their statutory composition, though not in practice, consist of a number of great officers of State with a President who is, for all purposes of administration, the Board.

(4) There remain the ministries which either never were, or have ceased in any sense to be, Committees of the Council.

It will be necessary to take the Privy Council apart from the various Boards which have grown out of its Committees, because the Privy Council is for many purposes the formal executive of the country. But, with the exception of the Privy Council, we will take the departments, or groups into which they fall, in the nearest possible approach to their

historical order, dealing first with the Chancery, the Privy Seal, and the Secretariat: then with the Treasury, the Admiralty, the Boards which have sprung from the Privy Council, and the ministries. There will still remain some offices which cannot be grouped, of which that of the Chancellor of the Duchy of Lancaster is politically the most important.

## II. THE PRIVY COUNCIL

Here we are concerned only with the functions of the Privy Council as a formal medium for expressing the royal pleasure in certain matters of executive government.

Some matters are of a formal character. The entire Council was summoned to receive Queen Victoria's announcement of her intended marriage; it is summoned to acclaim a new sovereign; in the Council persons are admitted to its membership or to the offices of State. It is in the Council that a minister takes the official oath, kisses the King's hands, and receives the insignia of his office; that a bishop does homage for the temporalities of his see; that the sheriffs of counties for the current year are chosen.

Other matters are dealt with either by Order in Council or by Proclamation;<sup>1</sup> passed in virtue of the prerogative of the Crown, or under Statute.

The multifarious character of the Orders in Council made under statutory powers or the prerogative may be seen by a reference to the annual volume of Statutory Rules and Orders. Some effect departmental legislation of a very important character. They are the instruments of government for Crown Colonies,<sup>2</sup> newly settled countries and protectorates;<sup>3</sup> they confirm or disallow the Acts of colonial legislatures; they give effect to treaties, deal with the application to mandated territories of preferential customs duties, control air navigation, grant charters to companies or municipal bodies, or regulate the business of departments,<sup>4</sup> or the control of aliens.

<sup>1</sup> See p. 62, *ante*.

<sup>2</sup> These may be prerogative Orders as for Ceylon or Malta, or statutory as for British Guiana under the British Guiana Act, 1928.

<sup>3</sup> These are statutory under the Foreign Jurisdiction Act, 1890.

<sup>4</sup> These are prerogative Orders.

In such cases the Council usually acts at the instance and on the responsibility of a department,<sup>1</sup> the Colonial Office, the Foreign Office, the Board of Trade, the Treasury, or the Home Office. When a petition is addressed to the Crown for the grant of a charter, the matter is referred to a Committee of the Privy Council for advice. Another Committee confirms the Statutes of Universities. It is only thus, through the agency of Committees, that the consultative functions of the Council survive. In other cases in which the Council may be left to act on its own responsibility it can consult the law officers of the Crown. The modes of summons to meetings of the Council and of Committees have been set forth earlier: the persons summoned—not less than four—need not consist entirely of Cabinet Ministers, nor is it necessary that more than three should be present.<sup>2</sup> The Orders of the Council are authenticated by the signature of the Clerk, and are duly sealed with the Seal of the Council.<sup>3</sup>

The President of the Council is appointed by a declaration made in Council by the King. He is an officer of the highest dignity. In the House of Lords he ranks next after the Chancellor and Treasurer, and this was his position in the Council. He now, by a custom the commencement of which is not certain, takes the first place at the council table on the King's right hand.

We may note the constant tendency of the business of the Privy Council to pass into the hands of specially constituted departments of government. Much of the work which is now done entirely by the Secretary of State for Foreign Affairs was formerly dealt with by a Committee of the Lords of the Council. The Colonial Office performs the functions of a quasi-committee of Council, the Lords of Trade (1696–1782). The statutory duties of the Board of Trade are discharged, not by the still surviving Committee of Council for Trade and Plantations, but by the President and Secretary of the Board.

<sup>1</sup> See *Commons Papers* for 1854, vol. xxvii, p. 221: Reports from Commissioners [1715].

<sup>2</sup> When business of special importance has to be approved it is usual to secure the presence of the minister responsible. Similarly the Archbishop of Canterbury is summoned when Orders on church matters are passed; A. Fitzroy, *Memoirs*, ii. 533.

<sup>3</sup> It dates from 1556; Labaree and Moody, *E.H.R.* xliii. 190–202.

The duties of the Council in regard to public health passed to the Local Government Board; in regard to agriculture to the more recently constituted Board of Agriculture,<sup>1</sup> and both these Boards are now single Ministries. Until 1899 there was a Committee of Council for Education, but this, too, is now superseded by a Board.<sup>2</sup> This transposition of business has gone on ever since the Council, in its entirety, ceased to be a consultative and became a purely executive body. The process began with the development of the various Secretarieships of State, and we see it continuing in the constitution of the modern Boards, and their replacement by Ministries.

Another point to note is the immense importance of the business which may be transacted in the Council without discussion, and with no opportunity of question in Parliament, at the instance of the Cabinet or of a department. Some of these matters might attract the attention of Parliament, though not till their effects could no longer be cancelled or undone. Of others Parliament would hardly take heed. The redistribution of duties in the War Office or Admiralty determines the channels through which skilled advice may reach the Secretary of State or the First Lord in the business of his department; the extension of the powers of the High Commissioner in South Africa amounted to an assumption of sovereign rights over a vast territory,<sup>3</sup> but the discussion on such action of the executive may be nearly nominal.<sup>4</sup> Again the House of Lords may be precluded from intervention by use of a statutory power as in the case of the abolition of purchase of army commissions,<sup>5</sup> or the grant under prerogative power of responsible government to the Transvaal and Orange River Colonies.<sup>6</sup> No doubt this is desirable in the interests of good government. The executive could not transact its business if every action depended on the approval of irresponsible politicians, and the collective

<sup>1</sup> From 1883 to 1889 there was a Committee of the Council for Agriculture. *Parl. Deb.*, 3rd Ser. ccxxxvi. 1768.

<sup>2</sup> 62 & 63 Vict. c. 33. Scottish educational matters are still formally regulated by minutes of the nominal Privy Council Committee on Education. On the work of the Privy Council department in respect of export trade licences in 1914–15 see A. Fitzroy, *Memoirs*, ii. 813 f.

<sup>3</sup> Order in Council, 9 May 1891.

<sup>4</sup> Order in Council, 21 Feb. 1888: *Parl. Deb.*, 3rd Ser. ccxxii. 253.

<sup>5</sup> May, *Const. Hist.* iii. 273, 276, 277.

<sup>6</sup> *Ibid.* iii. 334, 335.

House of Commons is well advised if it leaves to the executive the responsibility in their inception for measures for the results of which a government must ultimately render an account to the country. But there is need for control, as will later be shown.<sup>1</sup>

The Lord President is also responsible for the work of the Imperial Mineral Resources Bureau and the Medical Research Council, and remains responsible for the work of the former Committee of the Council for Scientific and Industrial Research.<sup>2</sup>

The Privy Council is one of the channels through which the pleasure of the Crown is expressed, but there are individual departments of government which exist or have existed for the same purpose. These are the Chancery, the office of the Privy Seal, and the Secretariat.

### III. THE CHANCERY AND THE SECRETARIAT

#### § 1. THE CHANCELLOR

The great office of Chancellor dates back in our history to the reign of Edward the Confessor. He was the chief of the King's secretaries, the chief of the King's chaplains, and custodian of the royal seal. Hence the appointment is still made by the King delivering the seal to the Chancellor and addressing him by that title. Edward the Confessor was the first King who used the Norman practice of sealing, instead of signing, documents to which he was a party, and the Chancellor is thus specially associated with the seal, though it is probable that earlier kings than Edward had employed one officer as chief of their secretarial and chapel staff.<sup>3</sup> Thus at the Norman Conquest the Chancery was principally a bureau of the charters.

All three functions combined to increase the Chancellor's importance. As Secretary he enjoyed the King's confidence in secular matters; as Chaplain he advised the King in mat-

<sup>1</sup> See pp. 247 ff., *post*.

<sup>2</sup> See *Commons Debates*, cxxxii. 631.

<sup>3</sup> Stubbs, *Const. Hist.* i. 352. The derivation of the name is there traced to the *cancelli* or screen, behind which the secretary's business was conducted, not to the jesting explanation of John of Salisbury, 'Hic est qui regni leges cancellat iniquas.'

ters of conscience ; as Keeper of the Seal<sup>1</sup> he was necessary to all outward and formal expressions of the royal will. In the reign of Henry II he ranked next in dignity after the Justiciar, whose disappearance after 1232 furthered his advancement, and was present at all Councils of the King.

In the reign of Edward I the Chancellor begins to appear in the three characters in which we now know him : as a great political officer, as the head of a department for the issue of writs and the custody of documents in which the King's interest is concerned, as the administrator of the King's grace.

He was a prominent member of the King's Council, where as a learned lawyer his opinion would carry weight ; in the fourteenth century the Chancery became the principal organ of the Council in administrative as well as judicial business. His original staff in the Chancery consisted of certain clerks whose duty it was to hear complaints and afford remedy by writ, and six others who were busied in engrossing writs. The formation of the three Common Law Courts doubtless removed from the Curia or the Council much judicial business in which the Chancellor had taken part, but he was brought into contact with the administration of justice as head of the department whence writs were issued, the *officina brevium*,<sup>2</sup> though in 1254 Parliament limited this power.<sup>3</sup>

To the Chancellor, who acted with the Council, or some part of it, were also specially referred petitions the response to which involved the use of the seal ; in common with the justices he was required to overlook all petitions, and determine what could and what could not be answered without reference to the King's grace. These latter the Chancellor and other chief ministers were directed to take to the King,<sup>4</sup> this function, however, was mainly ministerial.

But under Edward III matters came to be definitely committed to the Chancellor for decision,<sup>5</sup> as an alternative to the King in Council or the justices, and matters of grace were assigned to him or the Keeper of the Privy Seal.<sup>6</sup> From

<sup>1</sup> For the history of the Great Seal, see Nicolas, *Proceedings of the Privy Council*, vi, pp. clif.; Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England* (1926).

<sup>2</sup> Baldwin, *The King's Council*, p. 238 f.

<sup>3</sup> 13 Ed. I, c. 24.

<sup>4</sup> Ordinance of 1280; Baldwin, p. 246 f.

<sup>5</sup> Baldwin, pp. 254 ff.

<sup>6</sup> 22 Ed. III, Ordinance; Sir T. D. Hardy, *Intr. to Close Rolls*, p. xxviii.

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this point there begins to develop that body of rules—supplementing the deficiencies or correcting the harshness of the Common Law—which we call Equity.

It is with the formation and development of the rules of Equity that we commonly associate the history of the Chancellor's office. But the Chancellor as judge separates from the Council in the fifteenth century and forms part of the history of the Courts. His equitable jurisdiction, thus created, dissociated itself by degrees from other jurisdictions springing from the high office which had made him 'great alike in Curia and Exchequer'. For some time, as appears from the Calendar of Proceedings in Chancery, he was called on to deal with cases of violence and oppression,<sup>1</sup> such as more often came before the collective Privy Council;<sup>2</sup> and though he gradually dropped such cases, leaving them to the Council or to the Star Chamber, the tradition lingered late.<sup>3</sup>

It was doubtless because the Chancellor was the member of the Council to whom matters of grace were habitually referred, that the *petition of right*, the remedy possessed by the subject against the Sovereign, went through its earliest stages in the Chancery. The procedure in respect of this remedy was changed in 1860.<sup>4</sup>

Again, as having once been a member of the Curia and a baron of the Exchequer, he had some powers in common with the judges of the Common Law Courts.<sup>5</sup> He issued writs

<sup>1</sup> For statutory jurisdiction of this kind, see 20 Ed. III, c. 6; 36 Ed. III, c. 9.

<sup>2</sup> The following illustrate the text:

*William Midylton v. John of Cottingham.* Defendant assaulted and attempted to murder the plaintiff in Waughen Church in 'Holderness, and still lies in wait for him, so that he durst not abide in the country; *Calendar of Proceedings in Chancery*, i. p. xx.

*Robert Burton, Clerk v. Walter Yerburgh and William Hert.* Bill filed against defendants (followers of Wycliff) on account of various outrages against the plaintiff, in consequence of his opposition to the doctrines of Wycliff; *Calendar*, i. p. xxv temp. Henry VI, and see p. cxxviii temp. Henry VIII.

<sup>3</sup> Lord Campbell, writing in 1843, says, 'Anciently the Chancellor took cognizance of riots and conspiracies, upon applications for surety of the peace: but this criminal jurisdiction has been long obsolete, although articles of the peace still may be, and sometimes are, exhibited before him.' *Lives of the Chancellors*, i. 14.

<sup>4</sup> 23 & 24 Vict. c. 34.

<sup>5</sup> Spence, *Equitable Jurisdiction*, i. 336; Maitland, *Equity*, pp. 4 ff.

of Habeas Corpus, doing this in vacation as well as term, for the Chancery was always open, and writs of Prohibition to keep inferior Courts within their jurisdiction.

Again, the Chancellor acted judicially in the exercise of certain prerogatives of the Crown, its prerogative as to trade in matters of bankruptcy, its prerogative in respect of the persons and estates of idiots and lunatics, and the custody of infants. The jurisdiction in these matters is now governed almost entirely by Statute.<sup>1</sup> It remains to consider the official duties of the Chancellor.<sup>2</sup>

He is responsible for recommending to the Crown the appointment of the judges of the High Court, for the placing of names on the Commission of the Peace, and for their removal in case of need, acting usually, though not necessarily, on the advice of the Lord Lieutenant in the case of the county magistrates. In their case, although he does not expressly take the pleasure of the Crown, he acts as the exponent of the royal will; it would be possible, though it would be unusual, for directions to come to the Chancellor through a Secretary of State for the insertion or removal of a name on the Commission.<sup>3</sup> He is also responsible for the removal in case of need of coroners.

In the appointment and removal of County Court Judges, or the presentation to Crown livings valued in the books of Henry VIII at £20 or less, he is not expected to take the King's pleasure. In the first case by Statute,<sup>4</sup> in the second by custom,<sup>5</sup> he acts independently of the Crown.<sup>6</sup>

Besides his duties as a judge, and his responsibility for many judicial and some ecclesiastical appointments, the

<sup>1</sup> The Chancellor is entrusted by sign manual warrant with the care and custody of lunatics, 53 Vict. c. 108 (Lunacy Act, 1890); for the form of warrant, see Campbell, *Lives of the Chancellors*, i. 15. The wardship of infants and care of their estates is reserved to the Chancery Division of the High Court by the Judicature Act, 1873, s. 34, repeated by 15 & 16 Geo. V, c. 49, s. 56. Bankruptcy is dealt with under the Bankruptcy Act of 1914 by the High Court and County Courts.

<sup>2</sup> For his duties in the House of Lords, see vol. i, p. 241.

<sup>3</sup> *Harrison v. Bush* (1855), 5 E. & B. 344, at p. 351.

<sup>4</sup> 51 & 52 Vict. c. 43.

<sup>5</sup> Blackstone (ed. J. Chitty, 1826), iii. 48 and note; Campbell, i. 18.

<sup>6</sup> The second case is more especially noticeable because, when the Prime Minister presents to Crown livings of greater value, he takes the King's pleasure before the appointment is made; *Parl. Deb.*, 3rd Ser. clxix. 1919.

Chancellor is the head of the office in which his first duties began. The Crown Office in Chancery is no longer the *officina brevium*, the place where new rights of action were created as new writs were devised. The inventive powers of the clerks in Chancery failed to keep pace with the requirements of suitors; Equity and fictions had superseded the original writs long before the modern simplifications of procedure. But it is in the Crown Office in Chancery that the Great Seal is, for most purposes, affixed.<sup>1</sup> At the head of the permanent staff in this department is the Clerk of the Crown in Chancery, who holds an office of great dignity and antiquity. The duties and emoluments of this office were stated and defined as long ago as the twenty-second year of Edward III. The Clerk of the Crown may claim to be 'the first esquire and first clerk of England'.<sup>2</sup> He is appointed by sign manual warrant, and he takes a part in many important acts of the State. From his office issue writs for election of members to serve in the House of Commons; he receives and makes a list of the returns; when the royal assent is to be given to Bills in Parliament he attends in the House of Lords to read the Bills, and the Clerk of the Parliament gives the royal answer; when Sheriffs are to be chosen, as described later, he attends in the Court with the list of justices of the peace and notes who are named. His name written or printed at the end of documents to which the Great Seal is affixed authenticates the fact that the sealing has taken place on due warrant.<sup>3</sup>

Some few important matters, such as powers to treat, and ratifications,<sup>4</sup> do not pass through this office, but the Chancellor is directly responsible in all cases for the use of the Great Seal,<sup>5</sup> the ultimate expression of the will of the Sovereign. On the demise of the Crown the old seal is used until the new sovereign orders otherwise;<sup>6</sup> then the old seal becomes the Chancellor's property.

The Chancellor is, and always has been, a member of the

<sup>1</sup> The duties of the Petty Bag Office are now transferred to the Crown Office, 37 & 38 Vict. c. 81.   <sup>2</sup> Crown Office MS.   <sup>3</sup> 47 & 48 Vict. c. 29.

<sup>4</sup> Treaties and ratifications were at one time prepared and enrolled in the Chancery. This practice was uniform till 1624; Thomas, *Hist. of Public Departments*, p. 33.

<sup>5</sup> See 37 & 38 Vict. c. 81; 40 & 41 Vict. c. 41; 53 & 54 Vict. c. 2. See p. 67 above.   <sup>6</sup> 6 Anne, c. 11, s. 9.

Privy Council, and of the Cabinet, not as of right, but because his duties as holder of the Great Seal make him a necessary party to the innermost Councils of the Crown. His political and judicial duties do not necessarily come into conflict, because he is not concerned with the administration of the criminal law, and so is not liable to preside in Court over prosecutions which he has advised in the Cabinet. But the position is anomalous, and it has often been suggested that the political functions of the office should be transferred to a Minister of Justice.

There remain but a few points connected with the office:

(1) The Chancellor is Chancellor of that part of the United Kingdom called Great Britain,<sup>1</sup> and the Act of Union with Scotland provides that there should be but one Great Seal for the two kingdoms. There was a Lord Chancellor for Ireland, but the Great Seal, though it existed in duplicate for Irish use, was the Great Seal of the United Kingdom.<sup>2</sup> There are now separate Great Seals for Northern Ireland and the Irish Free State.

(2) The office is not subjected in law to any condition as to legal standing but apparently is subject to a religious disability. The Test Act<sup>3</sup> required that every one who held an office, civil or military, under the Crown, should not merely receive the sacrament after the ritual of the Church of England, but should take the oath abjuring the doctrine of transubstantiation.

The requirement as to taking the sacrament was removed in 1828,<sup>4</sup> and the Roman Catholic Relief Act, 1829,<sup>5</sup> altered the form of oath required, whether for a seat in Parliament or for entry upon a civil or military office, making it acceptable to a Roman Catholic. But it was provided that neither the Chancellor of Great Britain nor the Lord Keeper, nor Lords Commissioners of the Great Seal, should be relieved from any requirements to which they were at the time subject. The Statute Law Revision Act, 1863, has wholly repealed the Test Act of Charles II, and the Test Abolition Act, 1867, takes

<sup>1</sup> 47 & 48 Vict. c. 30, s. 4; 52 & 53 Vict. c. 63, s. 12 (1).

<sup>2</sup> See, as to the title of the Lord Chancellor, McQueen, *House of Lords and Privy Council*, p. 20; 13 Geo. V, sess. 2, c. 2, s. 2 (4); Quakett, *Const. of Northern Ireland*, ii. 68, 76, 223.

<sup>3</sup> 25 Car. II, c. 2.

<sup>4</sup> 9 Geo. IV, c. 17.

<sup>5</sup> 10 Geo. IV, c. 7.

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away the requirement of the oath against transubstantiation ; but it is still held that the exception introduced into the Catholic Relief Act disables a Roman Catholic for the offices therein mentioned.<sup>1</sup> So also a Jew is presumably ineligible.<sup>2</sup>

(3) The office of Lord Keeper of the Great Seal originated, as it would seem, in the practice of entrusting the Seal temporarily to an officer of State during a vacancy in the Chancellorship, sometimes with limited powers, or a lower rank. This developed into more permanent appointments, in which the Lord Keeper held office during the King's pleasure. He often was not a peer, but he is by Statute entitled to the 'like place, pre-eminence, jurisdiction, execution of laws, and all other customs, commodities, and advantages'<sup>3</sup> as the Lord Chancellor. The last Lord Keeper was Sir Robert Henley afterwards Lord Northington,<sup>4</sup> who was made Chancellor on the accession of George III.

(4) It is sometimes desirable to appoint by commission under the Great Seal certain persons to execute the office of Lord Chancellor. Their powers are declared by Statute to be in all respects such as the Lord Chancellor or Lord Keeper enjoys, but their rank is not the same. If peers, they take their place according to their peerage. If commoners,<sup>5</sup> they take place after the peers and the Speaker of the House of Commons.

## § 2. THE LORD PRIVY SEAL

The office of Lord Privy Seal is conferred by delivery of the Seal and by Letters Patent, and is held, sometimes without emolument,<sup>6</sup> by a member of the Cabinet ; but its duties are historical ; having long ceased to be more than formal, they were abolished in the year 1884.

<sup>1</sup> See debate in House of Commons, 4 Feb. 1891; *Parl. Deb.*, 3rd Ser. ccclxix. 1734.

<sup>2</sup> 9 & 10 Vict. c. 59 leaves the issue open.

<sup>3</sup> 5 Eliz. c. 18. Cf. 52 & 53 Vict. c. 63, s. 12 (1).

<sup>4</sup> Campbell, *Lives of the Chancellors*, i. 21; v. 186, 199.

<sup>5</sup> Though the Lord Chancellor need not be, he is regularly created a peer ; see vol. i: *Parliament*, 242.

<sup>6</sup> In 1705 the office was conferred upon the Duke of Newcastle by Letters Patent, with a salary of £365 per annum, and at the same time an order was made under the Privy Seal to the Treasurer of the Exchequer to pay to the Lord Privy Seal, during the Duke of Newcastle's tenure of the office, £4 a day in lieu of 'the dyet of 16 dishes of meat' to which that officer had previously been entitled. *St. P. Home Office, Precedents*, vol. i, pp. 15, 16.

The authority of the Privy Seal was formerly needed mainly for two purposes, the issue of money from the Exchequer, and the affixing of the Great Seal to Letters Patent, for it had been the desire of medieval Councils and Parliaments to secure adequate responsibility for the issue of public money, or for the action of the King in matters of State.

The need of the Privy Seal as the warrant for passing Letters Patent under the Great Seal was made a rule of the Privy Council of Henry VI, and was enforced by Statute in 1535.<sup>1</sup>

The need of this Seal for the issue of public money is thus stated by Coke:

'Every warrant of the Queen herself to issue her Treasure is not sufficient; for the Queen's warrant by word of mouth or, which is more, her warrant in writing under her privy signet is not sufficient. But the warrant which is sufficient to issue the King's Treasure ought to be under the Great or Privy Seal.'<sup>2</sup>

The Great Seal Act, 1884,<sup>3</sup> provided that 'it shall not be necessary that any instrument shall after the passing of this Act be passed under the Privy Seal'; and, though the clause has been repealed by the Statute Law Revision Act, 1898, modern enactments as to the use of the Great Seal and the issue of public money have superseded the employment of the Privy Seal for any purpose to which it could lawfully be applied.

Yet the office exists, and its history is a long one. 'A fit clerk to keep the Privy Seal' was one of the officers who by the ordinances of 1311 was to be chosen by the King with the counsel and consent of the baronage. In the reign of Edward III the keeper of the Privy Seal is a member of the King's Council: in the first Parliament of Richard II the Commons desire to control his appointment. The office was regarded with jealousy because of the frequent use of letters under Privy Seal as part of the procedure of the Council in its judicial work to interfere with the ordinary course of law.

From the middle of the sixteenth century the office has been held by statesmen of the first rank. Among the most

<sup>1</sup> 27 Hen. VIII, c. 11, and see p. 68, *supra*. Cf. Baldwin, *The King's Council*, pp. 255 ff.; Tout, *Chapters*, iii. 69 ff.; v. I ff.

<sup>2</sup> 11 Co. Rep. 92.

<sup>3</sup> 47 & 48 Vict. c. 30, s. 3.

interesting figures in the list of Lords Privy Seal are Thomas Cromwell (1536); Dr. Robinson (1711), who was at the same time Bishop of Bristol and Plenipotentiary for concluding the Treaty of Utrecht; and Lord Chatham, who held the office as Prime Minister in 1766. The office was assumed by Lord Salisbury in 1900, after he had retired from the Foreign Office, and held by him until his resignation in 1902; it was then held for a short time by Mr. Balfour; from 1924 to 1929 the leader of the House of Lords held this office. It is sometimes held by a minister deputed for special work; thus Mr. Thomas in 1929 when engaged in counteracting unemployment, and in 1932 Mr. Eden was given it to act for the Foreign Office especially in matters concerned with League of Nations questions. In his case, however, the usual practice, by which the office is held together with a seat in the Cabinet, was not followed.

### § 3. THE SECRETARIES OF STATE

His Majesty's Principal Secretaries of State, now eight in number, are the chief means of communication between the subject and the King. Peers of Parliament are Councillors of the Crown, and have a right of access to the person of the Sovereign. Privy Councillors are the sworn advisers of the King, and as such may individually or collectively offer counsel for which they must hold themselves responsible to Parliament. But outside of these is the mass of the King's subjects who can only address the Crown in Council or the Crown in person, and in the latter case the only approach to the Crown is through a Secretary of State. A department of government may be reached by direct communication: an aggrieved soldier, airman, or sailor may complain to the War Office, Air Ministry, or to the Admiralty; a Civil servant whose emoluments do not correspond with his estimate of his deserts may address the Lords of the Treasury, but no communication can be made to the Sovereign save through the intervention of a Secretary of State: nor with a few exceptions can any authentic communication be made by the Sovereign that is not countersigned by a Secretary of State.

The Secretaries of State are not merely the channels of

communication between subject and Sovereign. Each is the head of an important department of government, and in that department is invested with statutory powers, or administers certain prerogatives of the Crown, for the exercise of which he is responsible to Parliament. Of these powers it will be proper to speak hereafter in dealing with the special departments of these officers. It is enough here to trace the origin of the duties of the office of Secretary of State and the assignment to it of duties which necessitate the existence of eight principal Secretaries of State.

### *Development of the Office*

We first hear of the King's Secretary in the reign of Henry III. The duties of a Secretary had doubtless in earlier times been discharged by the Chancellor and his staff: but administrative business increased—the severance of the Chancery from the Exchequer at the end of the twelfth century indicates the increasing importance of both departments—and the King's Clerk or Secretary became an officer distinct from the clerks or chaplains who had acted under the Chancellor. The seal used by him was at first the Privy Seal, but that gradually passed as an official seal into the custody of a great officer of state, and the Secretary used another private seal, the Signet. The process seems to have been complete by the time of Richard II.<sup>1</sup>

The office was at first a part of the royal household. Its holder might be a man of character and capacity, fit to be a member of the King's Council, or to be sent as an envoy to foreign powers. Such were the Secretaries of Henry III and Edward I. Or he might be an inferior officer of the household, and such seems to have been the position of the Secretary of Edward III, who ranked in place and emolument with the surgeon and the clerks of the kitchen.<sup>2</sup>

In 1433 two Secretaries were appointed, one by the delivery of the King's Signet, the other by patent.<sup>3</sup> A second Secretary had become necessary for the transaction of the King's business in France.

<sup>1</sup> Tanner, *Tudor Const. Doc.*, pp. 202–4; L. B. Dibben, *E.H.R.* xxv. 430 ff.; Tout, *Chapters*, v. 161 ff.

<sup>2</sup> *Ordinances for the Royal Household*, pp. 10, 32, 162.

<sup>3</sup> Nicolas, *Proceedings of the Privy Council*, vi, p. cviii.

In 1443 an Ordinance or Order in Council made various rules to ensure the responsibility of the Council and officers of the King for answers given or grants made in response to petitions. Lords of the Council who promoted a petition were required to sign it: if the petition dealt with matters of grace, it was to be laid before the King thus endorsed: if he assented to it he was to sign it, or order the Chamberlain to do so, or to take it with his commands to the Secretary: if the answer involved a grant, the bill which contained the petition was to be delivered to the Secretary to prepare letters which, sealed with the Signet, should be authority for affixing the Privy Seal: and this in its turn authorized the confirmation of the grant by letters under the Great Seal.<sup>1</sup> Here we find the Secretary in a position of recognized responsibility for the expression of the King's will. And soon after, in 1476, a newly appointed Secretary is described as 'First and Principal Secretary', not, as it would seem, to denote a difference in the rank of the two Secretaries, but to mark the responsible character of the office, as distinct from that of a mere clerk or amanuensis,<sup>2</sup> or his superiority over his own staff.

The reign of Henry VIII marks an important advance in the position of the Principal Secretary.<sup>3</sup> The responsibility for the use of the Signet, indicated by the Ordinance of 1443, is confirmed by Statute.<sup>4</sup> The Secretaries are still members of the King's Household, but they rank next to the greater household officers,<sup>5</sup> and in Parliament<sup>6</sup> and Council they have their place assigned by Statute. The Secretary, if a baron, is to sit above all other barons; if a bishop, above all other bishops; if not a peer he is to sit on the uppermost form or woolsack of the House.

Yet they lived in extreme discomfort. In 1545 Sir W. Paget, one of the Secretaries and then ambassador in France, wrote to the other Secretary to beg that his lodging might

<sup>1</sup> Nicolas, *Proceedings of the Privy Council*, vi, p. clxxxviii; and see p. 68, *ante*.  
<sup>2</sup> *Ibid.*, p. cviii.

<sup>3</sup> Thus one Secretary from 1509 to 1516 was the Bishop of Durham.

<sup>4</sup> 27 Hen. VIII, c. 11.

<sup>5</sup> *Ordinances for the Royal Household*, p. 162.

<sup>6</sup> 31 Hen. VIII, c. 10; Stubbs, *Const. Hist.* iii. 471, 472. The presence of the Secretary, though a commoner, and of the judges, shows how the House of Lords, in the sixteenth century, did double duty as the *Magnum Concilium* and as a House of Parliament. Cf. p. 75, *ante*.

be changed for the better. ‘You know that the chambre over the gate will scant reseyve my bedde and a table to write at for myself. The study you know is not mete to be trampled in for diseasing his Majesty. I must nedes have a place to kepe my table in.’<sup>1</sup>

And yet not long before this pathetic complaint a warrant, issued to Thomas Wriothesley and Ralph Sadler, in 1539, gave them ‘the name and office of the King’s Majesty’s Principal Secretaries during his Highness’ pleasure’, required them to keep two Signets and a book of all warrants which passed under their hands, and placed them in Council next after the Vice-Chamberlain. They were both members of the Commons, but one was always to sit in the Upper House, and one in the Lower House, interchanging weeks, unless the King was present in the House of Lords, in which case both were to be there.<sup>2</sup>

The growing importance of the office is indicated not merely by the precedence given to the holders, but by the quality of the men who held it. Cromwell was for a short time Secretary to Henry VIII, and Sir William Cecil was Secretary to Elizabeth from her accession until he was made Lord Treasurer in 1571. After the reign of Henry VIII it would seem that the Secretary ceased to be an officer of the household, a fact attesting his growing status. He does not appear as an *item* in the household expenditure of Elizabeth, and in the reign of James I he was one of the few who might bring a servant with him to the King’s Court.<sup>3</sup>

During the greater part of Elizabeth’s reign there was but one Secretary, but at the close of it Sir Robert Cecil shared the duties with another, he being called ‘Our Principal Secretary of Estate’, and the other, ‘one of our Secretaries of Estate’ or ‘second Secretary’.<sup>4</sup> From this time, until the year 1794, it was the rule that there should be two Secretaries of State; the exceptions occurred in 1616, when there were three—from 1707 until 1746, when there was usually a third

<sup>1</sup> Thomas, *Hist. of Public Departments*, p. 26; vol. i, p. xiii of *State Papers*, 1830.

<sup>2</sup> Nicolas, vi, p. cxxiii, and see for the Warrant, vol. i, p. 623 of *State Papers*, 1830. <sup>3</sup> *Ordinances for the Royal Household*, p. 304.

<sup>4</sup> For his description see Warrant, 17 May 1600; *Calendar S.P. Dom., Eliz., 1598-1601*, p. 437.

At this point one may stop to consider the duties and powers of the Secretaries of State. From the reign of Henry VIII, certainly, they were the channel through which alone the Crown could be approached in home and foreign affairs, and the medium through which the pleasure of the Crown was expressed.

Thus the Secretary of Henry VIII complains that the Lord Mayor of London has communicated with Wolsey on a matter of State without first addressing him in order that the King's pleasure might be taken.<sup>1</sup>

The rules made by Edward VI for the conduct of business in the Council make the Secretary the medium of communication between the King and his Council or its Committees, a practice observed in the transmission of Cabinet minutes until comparatively recent times.<sup>2</sup>

Cecil in his treatise on *The Dignity of a Secretary of Estate with the care and peril thereof*, speaks of the Secretary's liberty of negotiation at discretion, at home and abroad, without 'authority or warrant (like other servants of princes) in disbursement, conference or commission, but the virtue and word of his Sovereign'.

The duties of a Secretary are very clearly set out in a memorandum by Dr. John Herbert, who was second Secretary about the year 1600. They are a formidable list. The Secretary was expected to possess a general knowledge of our relations with foreign countries, of the affairs of Wales and of the state of Ireland, while he had charge of all the Queen's correspondence with foreign princes, and, as it would seem, of the preparation of business for the Council, including the assignment to the Council, the Star Chamber, and the Court of Requests of matters falling within their respective provinces.<sup>3</sup>

The Secretaries were members of the Privy Council, and after the Restoration they were members of that inner Council which prepared and settled the business to be brought before the larger body, the Privy Council, with whose consent and

<sup>1</sup> Nicolas, vi, p. cxviii.

<sup>2</sup> Grenville Corresp. iii. 16 note.

<sup>3</sup> Prothero, *Statutes and Constitutional Documents*, p. 166; Tanner, *Tudor Const. Doc.*, pp. 212, 217.

advice the King acted. But it was not until the Privy Council ceased to combine deliberative and executive functions that the office of Secretary of State assumed its present importance.

Before this change took effect, a Secretary of State assisted at the private discussions of business to be brought before the Privy Council, he was a necessary instrument for carrying out the pleasure of the King, he might even be a personage whose opinion carried great weight, and yet he exercised little independent discretion in executive government. He was responsible directly to the King and the Council; remotely to Parliament. The Tudors from their own force of character had given importance to the office. It was something to be the exponent of the will of one who always had a will of his own. But throughout the greater part of the seventeenth century we find no Secretary of the calibre of Cromwell or Cecil, and in the reign of William III, although Shrewsbury, who held the office for some years, stood high in the confidence of the King and was a great figure in the State, it was always possible for a Secretary who was not of high rank to be regarded as a clerk. Sir William Trumbull resigned the office because, when the King was in Holland, the Lords Justices in Council treated him 'more like a footman than a Secretary'.<sup>1</sup>

But, when the Cabinet superseded the Council, the Secretary was not the servant of the Cabinet, as he had been the servant of the Council. He had been the medium of communication between the King and his Council, and between the Crown in Council, the recognized executive, and the outside world. But, when the Privy Council became an administrative department, and the Cabinet took its place as the motive power, a body unrecognized by law, the Secretary of State as a member of this inner circle became more independent, more responsible, and more important.

The tenure of the office by men of the political importance of Shrewsbury, Harley, and Bolingbroke may probably have helped to raise its character: and the difficulty with which George I made his wishes known in the language of his new subjects may also have contributed to the independence of the Secretaries. At any rate it would seem that from the date

<sup>1</sup> *Shrewsbury Correspondence* (Coxe), p. 504. He was lazy; Thomson, *Secretaries of State, 1671-1782*, p. 8.

of the Hanoverian succession things were done by the direction of a Secretary of State which had previously been done by royal order countersigned by a Secretary.<sup>1</sup>

Domestic, foreign, and colonial business which had been transacted by Committees of the Privy Council passed into the hands of the Secretaries, and they became the authorized exponents of the King's pleasure in the various departments of government. In the management of his department the modern Secretary of State is checked by the collective responsibility of the Cabinet, but he does not receive the orders of the Council, nor, since the King ceased to preside at Cabinet meetings, does he work under the constant control of the Crown.

Increased responsibility to Parliament adds to the power of every minister, for responsibility to Parliament means that the minister is a representative of the majority in Parliament and has the support of that majority at his back. Thus the Secretary of State has grown from being merely a confidential servant to be a great executive officer.

### *The Departmental Duties of the Secretaries*

From the Revolution until 1782, except during the temporary existence of the Scots and the Colonial Secretary, the duties of the two Secretaries were divided by a geographical division of the globe into Northern and Southern Departments. The duties of the Northern Department consisted in communications with the northern powers of Europe, those of the Southern included our dealings with France, Spain, Portugal, Switzerland, Italy, Turkey, as well as Irish and Colonial business and the work of the Home Office.

The burden laid upon the shoulders of the Southern Secretary is greater in appearance than in reality. Irish business consisted in communications as to general policy, passing through the Secretary of State from the Ministry to the Lord Lieutenant; for Ireland had its own Parliament and administration. The business of the colonies was shared with the

<sup>1</sup> The Warrant Books of George I and George II at the Record Office furnish evidence of this statement.

Board of Trade and Plantations, and from 1768 to 1782 a third Secretary of State was appointed, to deal primarily with colonial, especially American, affairs. The bulk of the work now cast upon the Home Office is the creation of modern Statutes. The Secretaries of the eighteenth century represented the Foreign Office cut in two, with some miscellaneous business assigned to that portion which dealt with the Southern powers of Europe.

Inconvenient as this arrangement may seem, its inconvenience is not brought before us very perceptibly in the records of the time. But in 1782 came a great change. The Southern Department became the Home Office, retaining Irish and Colonial business; the Northern Department became the Foreign Office; the Colonial Secretaryship was abolished.

This administrative reform, important at the time, and even more important as time went on, took place with singularly little noise or notice.

Down to 1782 the Northern and Southern Secretaries were described in official documents relating to the staff common to both, as 'His Majesty's Principal Secretaries of State for Foreign Affairs'.

The Northern Secretary on announcing his appointment to the resident ministers of foreign powers tells them that 'Le Roi m'ayant fait l'honneur de me nommer aujourd'hui son Secrétaire d'État pour le département du Nord', he will be glad to receive them on the following day to discuss matters committed to their charge.<sup>1</sup> Sometimes he included the ministers of the Southern powers in this invitation: this was done by Lord Weymouth in 1768, but he informs them that it is not for purposes of discussion; and by Lord Stormont in 1779, but he is careful to say that he is allowed to do it by the courtesy of his colleague.<sup>2</sup> But on 27 March 1782 Fox announces to all the foreign ministers that he will receive them 'le Roi m'ayant fait l'honneur de me nommer son Secrétaire d'État pour le *Département des affaires étrangères*'.<sup>3</sup> and the reason of the change of title is to be found in a document issued two days later.

<sup>1</sup> S.P. *Foreign, Entry Book*, 262, p. 202.

<sup>2</sup> Ibid., 262, pp. 156, 202.

<sup>3</sup> Ibid., p. 203.

This is a circular letter to our representatives at foreign Courts,<sup>1</sup> and runs thus:

'The King having, on the resignation of the Lord Viscount Stormont, been pleased to appoint me to be one of His Principal Secretaries of State, and at the same time to make a new arrangement in the Departments by conferring that for Domestic Affairs and the Colonies on the Earl of Shelburne, and entrusting me with the sole direction of the Department for Foreign Affairs, I am to desire that you will for the future address your letters to me.'

It does not appear that any Order in Council or Departmental minute authorizes or records this important administrative change.

Meantime the Home Secretary was concerned, to some extent, with the army: at least he was the ultimate exponent of the King's pleasure in matters relating to the government and disposition of the army, and was responsible to Parliament for the amount of force to be maintained. There was a Secretary at War, who was not a Secretary of State, but who was concerned with the passing of the Mutiny Bill, and was responsible for all that related to the finance of the Army. He directed the movements of troops subject to the sanction of the Secretary of State. It may be mentioned in passing that the Master General of the Ordnance provided munitions of war and controlled the Artillery and Engineers, that the Treasury managed the commissariat, and the Board of General Officers the clothing of the soldiers. The Commander-in-Chief was concerned with discipline and promotions.

This medley of official responsibility needed some guiding spirit in time of war, and during the struggle with the French Republic it was found that the Home Secretary was unequal to the charge of home and colonial affairs, together with the conduct of a great war. In that year a third Secretary of State was appointed, for War: but his responsibilities in respect of the Army were limited to the amount of force to be maintained, to the allotment of garrisons to our Colonies, and to the general control of operations in time of war.

In 1801 business relating to the Colonies was transferred to the Secretary of State for War, and during the long peace which followed upon the fall of Napoleon the development of

<sup>1</sup> S.P. *Domestic, Entry Book*, 416, p. 102.

our Colonies caused the war duties of the Secretary of State to fall into the background. The Crimean War revealed the chaos of our military system, and enforced the need of some simpler method of providing for the discipline, arming, feeding, clothing, and general government of the army.

In 1854 the Secretary of State for War and the Colonies was relieved of his duties in respect of the army, and a new Principal Secretary of State for War was created, whose office was intended to concentrate and supervise the incoherent machinery which had attempted to provide an army and its equipment.

The constitution of this new Secretaryship of State for War involved the passing of Statutes, but it must not be supposed that these were necessary to the creation of the Secretary of State.

Queen Victoria appointed a fourth Secretary of State by Declaration in Council,<sup>1</sup> and, as it was intended that he should absorb the powers and duties of the Board of Ordnance and the Secretary at War, such powers and duties as had been conferred on these officers by Statute were by Statute transferred to the new Secretary of State.<sup>2</sup>

In like manner, when the territories of the East India Company were taken over by the Crown at the close of the Indian Mutiny, in 1858, Parliament enacted that the powers and duties hitherto vested in, and exercised by, the East India Company should be held and discharged by one of Her Majesty's Principal Secretaries of State, though he was to be aided by a Statutory Council. And it was further enacted that, if Her Majesty was pleased to appoint a fifth Secretary, the salaries of himself and his under secretary should be the same as those enjoyed by their colleagues.<sup>3</sup>

Queen Victoria appointed a fifth Secretary, and the development of air warfare led in 1918 to the appointment of a Secretary of State for Air; in 1925 in order to accord recognition of Dominion status the Colonial Secretary assumed also a new Secretaryship for Dominion Affairs; a separate Secretary of State was appointed in 1930. In 1926 the Secretary for Scotland was raised to the status of a Secretary of State.

<sup>1</sup> *Parl. Deb.*, 3rd Ser. xxxvi. 425.

<sup>2</sup> Ordnance Board, 18 & 19 Vict. c. 117; Secretary at War, 26 & 27 Vict. c. 12.

<sup>3</sup> 21 & 22 Vict. c. 106, ss. 1, 6.

All are included in the commission of peace for each riding, county, and division, but six only can sit at one time in the Commons.

Except in so far as Statute gives powers to one or other of the Secretaries of State, each is capable of performing any one of the functions of the various departments.<sup>1</sup> The Secretaries are in this respect like the Judges of the High Court of Justice, each individually possesses and may exercise the powers of any one of the others, but, as its special business is assigned to each of the divisions of the High Court, so is a special department of government assigned to each of the members of the Secretariat. Each and all are primarily the means by which the royal pleasure is communicated,<sup>2</sup> the work of each department is the work of the Crown, acting on the advice of responsible ministers, and for such action and advice each of these ministers must answer to Parliament. As he is a proper channel of communication with the Crown, privilege attaches to any document on the business of his office addressed to him.<sup>3</sup>

The Secretaries of State are all appointed in the same manner by the delivery to them of three seals, the Signet, a lesser seal, and a small seal called the *cachet*: all these are engraved with the royal arms, but the Signet alone bears the royal arms with supporters.

'The office of Secretary of State in the legal sense depends on the grant and delivery of the seals. The title of the office is "one

<sup>1</sup> W. Pitt in 1797, defending the creation of the third Secretaryship, denies that 'each office of Secretary of State has (not by custom or convenience for practical purposes, but by law) a particular designation, department and division. I say the office of Secretary of State has no such department, designation and division, but is in the legal sense independent of any such distinction.' *Parl. Hist.* xxxiii. 976. See *Harrison v. Bush* (1855), 5 E. & B. 344, at p. 352.

<sup>2</sup> Much discussion took place in 1812, when the Prince Regent employed a *Private Secretary*, as to the constitutional position of such an officer. The House of Commons was assured that he was quite 'incapable of receiving the royal commands in the constitutional sense of the words or of carrying them into effect'. In fact he is not a means of expressing the *official will* of the Crown; Cobbett, *Parl. Debates*, xxii. 339. For the character and importance of his assistance to Crown and Ministers, see P. Emden, *Behind the Throne* (1934). His importance is increased by the fact that Dominion governments are now if they desire in direct relations with the King.

<sup>3</sup> *Sturt v. Blagg* (1847), 10 Q.B. (Ex. C.) 906.

of his Majesty's principal Secretaries of State". By the grant and the delivery of the seals,<sup>1</sup> every one of these persons becomes a legal organ to countersign any act of State, and he is placed afterwards in that department of business which his Majesty thinks fit to allot for him.<sup>2</sup>

So also the recall of the seals terminates the office, as when George III demanded the surrender of their seals by Fox and North.<sup>3</sup>

The Signet as noted above has a long history. The statutory requirement as to its use has been set forth earlier. For this purpose the Secretary of State had an office and four clerks, and, as the Secretaries increased in number, the Signet Office was considered to pertain to all alike, but the business was transacted through the Home Office.<sup>4</sup>

This use of the Signet was abolished in 1851. The duties heretofore performed by the Clerks of the Signet, and not superseded by this Act, were to be performed in the Home Office. But such use of the Signet as continues to be made does not call for the intervention of the Home Office. In the Foreign Office the instruments which authorize the affixing of the Great Seal to powers to treat, and ratifications of treaties, pass under the Signet as well as the sign manual, and are countersigned by the Secretary of State. In the Dominions and Colonial Offices, the Signet is affixed to Commissions, and also to Instructions to Governors; these last pass the

<sup>1</sup> It is stated by Todd (*Parl. Govt. in England*, ii. 495), and others, that a Secretary of State receives Letters Patent appointing him during pleasure. This is not so. Patents were issued from the time that a second Secretary was first appointed in the fifteenth century, and the practice appears to have been followed until 1852. In that year Lord John Russell became Foreign Secretary and Leader of the House of Commons in Lord Aberdeen's Ministry and, as he did not expect to be able to combine these two duties for long, he did not take out a patent, and in fact resigned the Foreign Office within two months. From that time the practice was intermittent (see *Parl. Deb.*, 3rd Ser. cxlii. 620, cxliii. 1426, cliii. 1300, 1828) until 1868. Since the retirement of Disraeli's Ministry in that year patents have not been issued: nor in any case would they affect the powers of the Secretary, for these follow the seals.

From 1855 until 1861 a supplementary patent—of doubtful validity—was issued to the Secretary of State for War purporting to assign separate powers in respect of military appointments and discipline to the Commander-in-Chief. No such patent was issued after 1861.

<sup>2</sup> Speech of Pitt; *Parl. Hist.* xxxiv. 976.

<sup>3</sup> May, *Const. Hist.* i. 49.

<sup>4</sup> 14 & 15 Vict. c. 82.

The second seal is used for royal warrants and commissions, countersigned by the Secretaries of State.

The cachet is used to seal the envelopes of letters containing certain official communications of a personal character made by the King or Queen to a foreign sovereign.

Thus in the Foreign Office all three seals are used. In the Dominions Office the first only; in the Colonial Office the first two; the second only in the Home Office, War Office, and Air Ministry; none are used in the India Office. The Scottish office has its own seals.

#### § 4. THE SECRETARY OF STATE FOR SCOTLAND

From the date of the Union until 1746 there was a Secretary for Scotland. Thenceforward, until 1885, the connexion of Scotland with the central government was maintained chiefly through the Home Office, but the labours of that heavily burdened department were relieved in this respect by the assistance rendered to it by the Lord Advocate. The Lord Advocate is the first law officer of the Crown in Scotland, corresponding to the Attorney-General in England, and he added to his duties as a law officer those of a Parliamentary Under Secretary to the Home Office for Scottish business.

In 1885 a Secretary for Scotland was created.<sup>2</sup> In his office was concentrated the business relating to Scotland which had before been transacted in various departments.

The powers and duties of the Home Secretary under 45 Acts 'and any Acts amending the said Acts', the powers and duties of the Privy Council as regards manufactures and public health, certain business heretofore transacted at the Treasury and the Local Government Board, and the administration of the Scottish Education Acts were assigned to this new Secretary, whose duties as to education correspond to those of the President of the Board of Education in England. Though he kept the Great Seal of Scotland he was not a Secretary of State, but a representative, for local purposes,

<sup>1</sup> This is an exception to the general rule of countersignature. The King signs the Instructions at the head, and initials them at the foot. They are then sealed with the Signet.

<sup>2</sup> 48 & 49 Vict. c. 61.

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of various departments of government. He was appointed by warrant under the royal sign manual, and after 1892 by the delivery of the Seal. In 1926 the office was raised to the rank of a Secretary of State, an office set up by Order in Council, 26 July 1926.<sup>1</sup> He is aided by a Parliamentary and Permanent Under Secretaries ; since 1928<sup>2</sup> he is head of the departments of Health, Agriculture, and Prisons, formerly Boards. Excluded from his authority are naturalization, extradition, aliens, dangerous drugs, workmen's compensation and certain powers as to factories, workshops, explosives, cruelty to animals, &c.

### § 5. THE FORMER CHIEF SECRETARY TO THE LORD LIEUTENANT OF IRELAND

Prior to 1920–2 theoretically the executive government of Ireland was conducted by the Lord Lieutenant in Council, subject to instructions from the Home Office of the United Kingdom. Practically it was conducted for all important purposes by the Chief Secretary to the Lord Lieutenant, who was Keeper of the Privy Seal in Ireland,<sup>3</sup> and President of the Local Government Board.<sup>4</sup>

While Scotland was wholly separate from England until the Union of 1707, when the two kingdoms were wholly united, Ireland was always in the position of a dependency ; to which from 1782 until 1800 legislative independence was conceded. Its separation from England by the sea further contributed to keep up the apparatus of a provincial government ; so that, while Scotland was long governed directly from the Home Office, Privy Council, and other central departments, those same departments, in so far as they were not reproduced in Ireland, communicated to the Lord Lieutenant the instructions of the central government.

Thus the office of Chief Secretary varied in importance from time to time. When Ireland had a Parliament, still more when it had an independent Parliament, the Chief Secretary was to the Lord Lieutenant what a Secretary of State is to the Crown, the exponent of the pleasure of the supreme executive.

After the Act of Union the Lord Lieutenant governed

<sup>1</sup> Under 16 & 17 Geo V, c. 18, s. 1.

<sup>2</sup> 18 & 19 Geo. V, c. 34.

<sup>3</sup> 57 Geo. III, c. 62, s. 11.

<sup>4</sup> 35 & 36 Vict. c. 69, s. 3.

Ireland subject to instructions from home, and his Chief Secretary, sitting in the House of Commons, did no more than explain small matters of local government.<sup>1</sup>

But, as the business of departments multiplied, the Home Office ceased to deal with the details of Irish administration;<sup>2</sup> and, as communication became easier, the formal apparatus of Irish government became less necessary. The Lord Lieutenant represented the splendour and carried out the formalities of executive government; the Chief Secretary conducted the business of the various departments of Irish government. One of the two was in the Cabinet, but not both. Ireland had also a complete series of Courts on the English model, with a Lord Chancellor, appeal lying to the House of Lords.

Under the legislation of 1920–2<sup>3</sup> Ireland is divided into two parts, Northern Ireland, still a portion of the United Kingdom, and the Irish Free State.

#### IV. THE TREASURY AND ITS OFFICERS

##### § 1. HISTORY OF THE TREASURY

The Normans introduced into our institutions, though not from Normandy,<sup>4</sup> a methodical system of finance. The Exchequer was the Curia sitting for financial purposes.<sup>5</sup> But there were certain officers of the Curia whose duties lay specially in the Exchequer, and a clerical staff appropriate to the business of the department.

<sup>1</sup> Cf. *Croker Correspondence*, i. 12.

<sup>2</sup> Sir William Harcourt, speaking in 1881 of the doctrine that he, as Home Secretary, was constitutionally responsible for the government of Ireland, says: 'In one sense that is true, in another sense it is not perfectly accurate. The Right Hon. Gentleman knows perfectly well that the Home Secretary is the only medium of communication between the Sovereign and the Lord Lieutenant, and he also knows that the details of Irish administration do not pass through the Home Office. Therefore, I do not think that the noble Lord can seriously suppose that I am the proper source of information with regard to the details of the administration of the Executive of Ireland'; *Parl. Deb.*, 3rd Ser. ccxxii. 22. Cf. Gardiner, *Sir W. Harcourt*, i. 422 ff.

<sup>3</sup> 10 & 11 Geo. V, c. 57; 13 Geo. V, sess. 2, cc. 1 and 2. See ch. vii, *post*.

<sup>4</sup> Cf. Holdsworth, *H.E.L.* i. 42–6.

<sup>5</sup> The *Dialogus de Scaccario* gives a description in very great detail. See R. L. Poole, *The Exchequer in the Twelfth Century* (1912). As usual much non-financial business was transacted at the Exchequer; Baldwin, *The King's Council*, ch. ix. For later history see Sir T. Heath, *The Treasury*.

The Exchequer consisted of two offices, the Upper and the Lower: the first was a court of *Account*, the second of *Receipt*. What was due to the King was ascertained in the Exchequer of Account and paid in to the Exchequer of Receipt, and for payments made in the latter acquittance was obtained in the former.

The Treasurer and barons sat in the Upper Exchequer to take account of what was due to the King, and to exercise a general financial control.<sup>1</sup> The Treasurer was also responsible for the receipt and issue of the revenue in the Lower Exchequer. He was the connecting link between the two departments, but not necessarily the most important person at the Exchequer board, so long as he had to contend with the Justiciar and Chancellor. In the reign of Richard I the Chancery was separated from the Exchequer, a new series of rolls appearing in 1199 and the Chancellor retired in 18 or 22 Henry III from attendance at the Exchequer.<sup>2</sup> The Great Seal was now no longer used for Exchequer purposes, and the Chancellor of the Exchequer, originally the Chancellor's clerk, was brought into existence, partly to take charge of the Seal of the Exchequer, partly to be a check on the Treasurer.<sup>3</sup>

From the fall of Hubert de Burgh in 1232 the office of Justiciar rapidly lost importance, till, before the end of the reign of Henry III, it disappeared. This further increased the importance of the Treasurer. The Exchequer developed very early an equity jurisdiction as well as a common law jurisdiction, and rivalled Chancery until under Edward II in 1311–16 it was definitely worsted, and the Chancellor became admittedly the first minister. In 1300 the Exchequer was fixed at Westminster,<sup>4</sup> and the Treasurer and barons were forbidden to

<sup>1</sup> Thomas, *Hist. of Public Departments*, p. 37.

<sup>2</sup> Madox, *History of Exchequer*, ch. iv, s. 10. Cf. Baldwin, *The King's Council*, p. 46. Tout, *Chapters*, i. 146 f. puts the separation earlier; on the seal, *ibid.* 141 ff.

<sup>3</sup> *Ibid.*, ch. xxi, s. 3. The Chancellor of the Exchequer was not the 'lieutenant' of the Treasurer. The lieutenant was merely a deputy to whom the Treasurer might from time to time assign his duties; *ibid.*, ch. xxi, s. 2.

<sup>4</sup> 28 Ed. I, c. 4. This clause of the *Articuli super cartas* did but enforce a rule the breach of which had been matter of frequent complaint. See Madox, ch. xxii, s. 2. The equity jurisdiction was not so successful in resisting attack, and was limited to minor causes; Baldwin, pp. 228–32. The judicial rolls start in 1236–7.

hear pleas between the King's subjects. The attempt to confine the jurisdiction of the Exchequer to revenue cases was evaded by fictions, and the judicial business which had been transacted before the barons in the Exchequer of Account passed to a definite Court—the Court of Exchequer. From the beginning of the fourteenth century a Chief Baron presided over this Court, and the term Barons of the Exchequer from 1234 ceased to designate high officials of the Exchequer, and came to be applied to a distinct set of officers with mixed judicial and administrative functions.<sup>1</sup>

Later the office of the Treasurer regained importance, but it is not till near the end of the sixteenth century that he became an officer of State so engrossed in the general policy of the country as to be unable to attend personally to the detail of his department. Lord Burghley was the first to employ a secretary to communicate his instructions to the Exchequer of Receipt.<sup>2</sup> Before this time the title underwent a change.<sup>3</sup> The person holding the office had been called the King's Treasurer or the Treasurer of the Exchequer, but when he became the second officer in dignity after the Chancellor his title of King's Treasurer develops into that of Lord High Treasurer.<sup>4</sup> He was also Treasurer of the Exchequer, but the offices were distinct: the first was conferred by delivery of a white staff, the second by patent; the first was a great office of State; the second placed him at the head of the Exchequer.<sup>5</sup>

The office of Treasurer was first put into Commission on the death of Lord Salisbury in 1612. From this period, though the Treasurers transacted business in the Exchequer of Receipt until 1643, the Treasury has become a separate department;

<sup>1</sup> Haydn, *Book of Dignities*, p. 381; Madox, ch. xxi, s. 3. The title, 'capitalis baro', in a technical sense seems to have been first used in the case of Walter Norwich in 1312. See Tout, *Edward II*, pp. 383 ff.; Holdsworth, *H.E.L.* i. 232.

<sup>2</sup> Madox, p. 568; *Report on Public Income and Expenditure* (1869), i. 336.

<sup>3</sup> Thomas, *Hist. of Public Departments*, p. 4.

<sup>4</sup> 31 Hen. VIII, c. 11.

<sup>5</sup> See the account of the admission of Godolphin; Thomas, *Hist. of Public Departments*, p. 2; and of Harley, *Calendar of Treasury Papers*, vol. iv, preface. The first account is taken from the Black Book of the Exchequer; the second from an entry made on a fly-leaf of the Treasury Minute Book. It is difficult to conjecture from these accounts what would have been the duties of the Lord High Treasurer if the staff and the patent had been conferred on different persons.

its authority is necessary for the issue of money from the Exchequer of Receipt, and it exercises the financial control once possessed by the Exchequer of Account. When at the Restoration the Treasury was not only put for a short time into Commission, but located in a separate set of rooms at Whitehall, the severance of Treasury and Exchequer was complete. The Upper Exchequer may by that time be said to have passed away into (i) a law court—the Court of Exchequer, (ii) a body of auditors, of whom we shall have to speak later, and (iii) a department—the Treasury. Since 1835 the Paymaster-General and the Treasury have discharged the duties of the Exchequer of Account, apart from those of Audit which have gone to the Controller and Auditor-General; the Exchequer of Receipt is now the Bank of England. The office of Lord High Treasurer was filled from time to time until 13 October 1714, when the Duke of Shrewsbury resigned the white staff. Since then the Treasury has always been in Commission.

By the Act of Union with Scotland, the Scots and English Treasuries were merged, and in 1833 the powers of the Barons of the Exchequer in Scotland were transferred to the Treasury. But after the Union with Ireland the office of Lord High Treasurer for Ireland was continued until 1816.<sup>1</sup> Under present conditions the Irish Free State has financial independence.<sup>2</sup> Northern Ireland has a Ministry of Finance but is only in partial control of financial matters in its territory.<sup>3</sup>

## § 2. THE COMMISSION OF THE TREASURY

The Treasury Board is created by Letters Patent under the Great Seal<sup>4</sup> appointing the persons named therein to be Commissioners of the Treasury of the United Kingdom.

The Board consists of the First Lord, the Chancellor of the Exchequer, and a varying number of Junior Lords.

Until 1711, whenever the Treasury was put into Commis-

<sup>1</sup> As to the inconveniences which arose from the existence of the two Treasuries, see Parker, *Memoirs of Sir R. Peel*, i. 111–14.

<sup>2</sup> For the transfer of powers, see S.R. & O., 1922 (No. 315) at p. 474.

<sup>3</sup> See Sir A. Quekett, *The Constitution of Northern Ireland*, Pt. II, ch. vi.

<sup>4</sup> See the form of patent, Appendix § 1. In Northern Ireland part of their former duties has passed to the Minister of Finance.

sion, the King named all the Lords, and the First Lord was only a more important minister than the others, 'primus inter pares'.<sup>1</sup> Since 1711 the First Lord has nominated the Junior Lords, and since the Ministry of Sir Robert Walpole (1721–42) the office of First Lord has usually been associated with the position of Prime Minister. The exceptions to this rule are of two kinds.

There have been occasions in the 18th century when there was no definite Prime Minister, as in the chaotic state of parties after the fall of Walpole, when Lord Wilmington was First Lord of the Treasury, while Carteret and Henry Pelham struggled for ascendancy in the Ministry; or again when William Pitt the elder was Secretary of State and controlled the policy of the country, while Newcastle distributed the patronage as First Lord of the Treasury; or again as in the coalition Ministry of 1783 when the Duke of Portland, who was First Lord, was Prime Minister only in name, and Fox and North divided the responsibilities of government.

There have also been occasions when the Prime Minister has deliberately chosen an office either less or more laborious than that of First Lord. Thus Lord Chatham in 1766, when entrusted by George III with the formation of a Ministry, chose the office of Lord Privy Seal. At this time the Treasury Board met twice a week for the transaction of business, and Chatham was perhaps desirous of being relieved from these routine duties. Fox in 1806, and Lord Salisbury in 1885 and again in 1887 and 1895, undertook to combine the duties of Foreign Secretary with those of Prime Minister. The effort of Mr. MacDonald in 1924 to combine these very onerous offices was not repeated in 1929–31. Mr. Gladstone united the duties of Prime Minister and leader of the House of Commons with those of Chancellor of the Exchequer for a few months in 1873 and 1874 when Parliament was not sitting,<sup>2</sup> and again from the spring of 1880 to the beginning of 1882, but this combination tends to become less frequent.<sup>3</sup>

<sup>1</sup> Todd, *Parl. Govt. in England*, ii. 424.

<sup>2</sup> This was due to the necessity of removing Mr. Lowe from that office because of an indiscretion: it raised a difficult issue as to vacation of office; May, *Const. Hist.* iii. 85–7.

<sup>3</sup> Pitt, Addington, Perceval, and Peel are the only other instances in the last 140 years.

In 1885 the First Lord, Lord Iddesleigh, was neither Prime Minister nor a member of the House of Commons. The arrangement was anomalous, though the large experience of Lord Iddesleigh in matters of finance may have rendered it not inconvenient.

The First Lord of the Treasury has a large patronage, but takes no part in the duties of the Treasury, unless questions should arise in the business of the department which the Chancellor of the Exchequer cannot settle, such as disputes with the heads of other departments; in such a case his position as titular head of the Board and as Prime Minister or leader of the House of Commons adds weight to his decision.

The Treasury Board does not now meet except on extraordinary occasions, but until the beginning of the 19th century its meetings were a reality.<sup>1</sup> The Lords of the Treasury, and the Chancellor of the Exchequer, sat round the table, at the head of which the King, till the accession of George III, used to preside,<sup>2</sup> seated in a large chair, which is still in the Treasury offices; the Secretaries attended with their papers; these were discussed and minutes kept by the Secretaries which were drawn out and read the next day. Business increased during the great wars of the 18th century, till it grew beyond the powers of a Board to transact; the meetings became formal, taking place twice a week; after 1827 the First Lord and Chancellor of the Exchequer ceased to attend; the business was prepared beforehand for the sanction of the lords.<sup>3</sup> Since 1856 the meetings have been discontinued; individual members of the Treasury staff are now personally responsible for business which is transacted under the general control of the Chancellor of the Exchequer.

### § 3. THE CHANCELLOR OF THE EXCHEQUER

The Chancellor of the Exchequer is always one of the Commission of the Treasury, but he is appointed Chancellor of the Exchequer and Under Treasurer by separate patents, and by the receipt of the Exchequer Seals.

<sup>1</sup> In the reign of Anne the Board sat on four days of the week; *Calendar of Treasury Papers*, iv, p. xv.

<sup>2</sup> George III gave up the hereditary revenues for a fixed Civil List, and so had no personal interest in the business of the Treasury.

<sup>3</sup> *Common Papers*, 1847, xviii. 141-8: Evidence of Sir Charles Trevelyan.

His duties originally consisted in the custody and employment of the seal, in the keeping of a counter-roll which should check the accuracy of the roll kept by the Treasurer, and in the discharge of certain judicial functions in the Exchequer Account, of which there remains but one, and that merely formal. The more strictly financial duties of the Chancellor of the Exchequer belong to the post of Under Treasurer, which was connected with his office in the reign of Henry VII.<sup>1</sup>

The post was not of great importance so long as the Treasury Board was in active working. Throughout a great part of the last century it was not necessarily a Cabinet office, unless held in conjunction with the first Lordship of the Treasury. But Palmerston was offered the post with a seat in the Cabinet in 1809 when only 25 years old.<sup>2</sup>

As the Treasury Board has diminished, so the Chancellor of the Exchequer has risen, in importance. At the present time he is in fact a Finance Minister, with most important duties, and the Board of which he is a member consists of persons whose duties are unconnected with the work of the Treasury, the chief of them being the Prime Minister.

The duties of the old Exchequer of Account and of the Treasurer were to the King. It was the business of the office to see that the King's debtors paid all that they owed, and that the King's creditors got no more than was their due. The duties of the Treasury and of the Chancellor of the Exchequer are to the taxpayer. It is the business of the department to see that no more money is asked for than is wanted, i.e. to consider the relative importance of the reforms suggested by departments and the cost to the public, and that no more money is spent than has been authorized by Parliament. The estimates are supervised in the Treasury before they are presented to Parliament, and Bills which lay a charge on the Consolidated Fund, or on money which Parliament is to provide for the services of the year, must receive the assent of the Treasury before they are introduced into Parliament. Rules are laid down for Cabinet procedure which secure that financial proposals shall not be submitted without

<sup>1</sup> *Report on Public Income and Expenditure*, 1869, part 2, p. 335.

<sup>2</sup> Memoir of Right Hon. W. Dowdeswell; *Cavendish Debates*, i. 576; Bulwer, *Life of Palmerston*, i. 91.

Treasury consideration.<sup>1</sup> If this were not so the Chancellor of the Exchequer would not be able to balance revenue and expenditure. Besides this, the Treasury exercises a general control over official salaries, fixing them in the first instance, and afterwards ascertaining from time to time that work which is paid for is actually done. It is responsible not merely for the amount demanded of the taxpayer, but also for the expenditure of public money in the mode indicated by Parliament. With this we shall deal hereafter. It is impossible for the Chancellor of the Exchequer to attend personally to these matters in detail; they are supervised by the permanent staff of the department; but the policy which governs the action of the department is indicated by the Chancellor of the Exchequer.

And he has other duties. It is his business when he knows the amount of the public income, and the extent of the demands upon it, to adjust revenue to expenditure, to raise or remit taxation as the occasion may justify, and to discover how money may be raised in greatest plenty, with least inconvenience. The recent adoption of protective tariffs has greatly complicated these problems by involving them with economic issues. Currency problems are likewise essentially involved.

Furthermore, it is his business to obtain the assent of Parliament to his plans for the taxation of the year, and assisted by the Financial Secretary to represent the department in the House of Commons. The Chancellor of the Exchequer and his staff may be regarded as living in perpetual vigilance against servants of the State, who want more pay than the Treasury thinks the country can afford—against departments of government, which want more money than the Chancellor is prepared to ask Parliament to grant—against the House of Commons, which contests the amount demanded, and the mode in which it is proposed to be raised—and against the taxpayer who wishes to have everything handsome about him, and does not like to pay for it.

It remains to consider the remnant of the Chancellor's judicial powers. The Chancellor and Treasurer were entitled to sit with the Barons of the Exchequer when that Court sat

<sup>1</sup> Sir T. Heath, *The Treasury*, pp. 58 ff.

as a Court of Equity. Sir Robert Walpole sat and gave a casting vote in 1735. But the Equity jurisdiction of the Court was taken away in 1841,<sup>1</sup> and the Judicature Act excluded the Treasurer and the Chancellor of the Exchequer from judicial powers in the High Court or Court of Appeal.<sup>2</sup>

But in the appointment of Sheriffs the Chancellor resumes his old place as though in the Exchequer of Account. The ceremony, which takes place on the 12th of November, the morrow of St. Martin, recalls the ancient Exchequer, wherein the Sheriffs were the connecting link between the shiremoot and the Curia. Not only are the Judges summoned for this appointment, but all members of the Cabinet. The justiciarii and great officers of State sit once more on the Exchequer side of the Curia, only the Exchequer and its Barons have gone, and the Chancellor of the Exchequer finds himself presiding in the King's Bench division of the High Court of Justice.<sup>3</sup> The King's Remembrancer reads out the names on the list for the ensuing year, the Judges supply names sufficient to complete the number of three for each county, the Clerk of the Privy Council reads out excuses, and the Lords of the Council and Judges accept or reject the excuses. The list is made out, and the subsequent proceedings take place at the Privy Council.<sup>4</sup>

#### § 4. THE PARLIAMENTARY STAFF

The Junior Lords who, with the First Lord and Chancellor of the Exchequer, make up the Commission of the Treasury, are usually three in number, but two unpaid Lords are usually also appointed. Their duties are political; they act as assistant Whips, and help the Parliamentary Secretary,<sup>5</sup> the senior Whip, to bring up the rank and file of the Government supporters when required for a division.

<sup>1</sup> 5 Vict. c. 5.

<sup>2</sup> 36 & 37 Vict. c. 66, s. 96.

<sup>3</sup> 44 & 45 Vict. c. 68, s. 16.

<sup>4</sup> The Sheriffs Act, 50 & 51 Vict. c. 55, does not require that more than one great officer of State should be present, and two judges. Practically it is necessary that six or seven judges should attend; *Report of Select Committee of Lords on the Office of High Sheriff*, Com. Papers, 257, 1888. The Lords of the Council determine the order in which the names shall stand, and at a subsequent meeting the King pricks the name selected for each county. In the case of Lancaster the Chancellor of the Duchy acts.

<sup>5</sup> Formerly Patronage Secretary from his control of revenue and other offices as means of exercising political influence.

The Financial Secretary is the subordinate of the Chancellor of the Exchequer. He is usually responsible for the estimates for the revenue departments and the Civil Service, and for votes of credit; he has to do the drudgery of the financial business transacted in Parliament, to take charge of Bills which affect the Revenue, and to defend the estimates laid before the House of Commons.

The history of these last-mentioned officers is somewhat obscure. Lord Burghley appears to have been the first Treasurer who employed a Secretary to give his instructions to the Treasury. The first notice of joint Secretaries was when Lord Rochester was Treasurer in the reign of James I; after that there was but one until 1714, when there were again two. From the commencement of the eighteenth century the post was held with a seat in the House of Commons.<sup>1</sup> Since then they have generally, and for some time past always, been members of the House. Their offices are not held *from or under the Crown*, and they are appointed simply by being 'called in' to the Treasury Board.

The mode of appointment is a curious anomaly. The position of the Financial Secretary, who is usually a rising young politician, gives him an intimate knowledge of the work of an important department, and therewith an administrative and Parliamentary experience which usually leads to Cabinet office. The Parliamentary Secretary, as chief Whip, guides the Parliamentary destinies of a Government, and may be called upon to advise a Cabinet on questions of Parliamentary policy of the gravest importance. But these two officers, though their selection is a matter of concern in the formation of a Government, are nominally and formally appointed by a Board of which the majority consist of the assistant Whips, the junior Lords of the Treasury, whose duties, as defined by Canning, were 'to make a House, keep a House, and cheer the Minister'.

### § 5. THE PERMANENT STAFF

These political officers described above who change with the rise and fall of parties are the temporary chiefs of a

<sup>1</sup> See, as to the history of the Secretary to the Treasury, Thomas, *Hist. of Public Departments*, pp. 16, 17.

permanent staff. The practical inconvenience of frequent change in the Secretaries of the Treasury was felt in 1805, and was met by the creation of a Permanent Secretary, whose office is now incompatible with a seat in Parliament, whose duty it is to supervise the daily work of the Treasury, and to inform and assist the Parliamentary representatives of the department. He is the head of the Civil Service, and advises as to the filling of the head offices of other departments and as to honours for civil servants. Since 1920 the Treasury is empowered to make regulations for Civil Service remuneration, and an Under-Secretary surveys all questions of the size and remuneration of official staffs. Matters of revenue and expenditure are dealt with by the Second Secretary. Statutory control is given to the Treasury in respect of the form of keeping the public accounts; and in the employment, as well as in the grant, of public money the Treasury possesses, either by Statute, by custom, or by arrangement, a wide supervision. This control can only be efficient, or even possible, by reason of the permanence of the body of officials who exercise it. Economy can only be maintained by constant watchfulness over the springs and sources of expenditure. It would be idle to expect officials, who were dependent for their position on the continued existence of a government, to take up the threads of departmental policy just where their predecessors had laid them down, to incur the unpopularity which is the lot of the economist, without the prospect of seeing the fruits of their labours. In no department is a permanent staff more essential than in the Treasury.

#### § 6. DEPARTMENTS CONNECTED WITH THE TREASURY

In close connexion with the Treasury are several departments of government. The reason of such connexion differs in the different cases, as does the character of the connexion. Some of these departments will be discussed later in dealing with the revenue and expenditure of the Crown.

The Comptroller and Auditor-General is an official independent of any government department, but discharging functions which keep him in constant communication with the Treasury: for the departments of government cannot obtain money without the intervention of the Treasury, and

the Treasury cannot supply their needs or check their expenditure without the aid of the Comptroller and Auditor-General. But he stands apart from politics: his salary does not come under the annual consideration of Parliament, but is charged on the Consolidated Fund.<sup>1</sup>

The other departments which are in immediate connexion with the Treasury are somewhat miscellaneous, with the exception of those which are concerned with the collection of the revenue: these are the Commissioners of Customs; of Inland Revenue; of Crown Lands, i.e. of the Land Revenues of the Crown; and the Postmaster-General.

Certain offices appear in the estimates as the departments of the Treasury; such is that of the Paymaster-General, an office which has by successive Statutes<sup>2</sup> absorbed all the offices through which public money voted by Parliament was previously paid, under conditions enriching the officials at the public cost. The office is political, but now honorary; it is tenable with a seat in the House of Commons, and the holder was never required to offer himself for re-election on its acceptance. The appointment is by sign manual warrant. The duties are discharged by the permanent staff of the Pay Office, with powers granted by the Paymaster-General.

Such also is the office of the Parliamentary Counsel, who are appointed by Treasury Minute. The duty of these gentlemen is to draft the Bills which embody the Government measures. It is a difficult duty to discharge with success,<sup>3</sup> for they must not only put the intentions of the Government into an artistic statutory form, making this form consistent with previous legislation on the subject, if necessary by repeal of portions of existing Statutes, but they have to deal with the unskilled energies of the private member in the way of amendment, and to keep in view the more formidable ordeal of judicial ingenuity in the way of construction. Thus they are required to watch the Bill through every stage in either House, and to supply the minister in charge of it with the necessary arguments to meet amendments which

<sup>1</sup> 29 & 30 Vict. c. 39, s. 4. For a fuller account of the duties of this officer, see ch. ix.

<sup>2</sup> 5 & 6 Will. IV, c. 35, and 11 & 12 Vict. c. 55.

<sup>3</sup> The House of Lords severely criticizes drafting, especially of taxing Acts in which legislation by reference is constantly resorted to.

Other minor departments figure in the Civil Service estimates as subordinate to the Treasury, but we may pass from these to the departments which are concerned with the collection of revenue.

These are the Commission of Crown Lands,<sup>1</sup> the Board of Customs, the Board of Inland Revenue, and the Post Office.

The Commissioners of Crown Lands are a department of the Civil Service entrusted with the duty of administering the Crown Lands and collecting the land revenues of the Crown.

They are appointed, two in number, by sign manual warrant, and the Minister of Agriculture and Fisheries is a Commissioner *ex officio* without additional pay, who can represent the Commission in Parliament. They are connected with the Treasury as being responsible for a branch, though a small branch, of the revenue.

Boards of Commissioners of Customs and Excise and of Inland Revenue are appointed by Letters Patent, and the Chairman of each Board by sign manual warrant. They are distinctly revenue departments, and their work is more appropriately considered when we come to deal with the sources of public revenue, distinguishing that which springs from duties levied on foreign goods entering the country and that which comes from other forms of taxation. The Post Office demands separate treatment.

### § 7. THE POST OFFICE

The Post Office differs from the Commission of Crown Lands in that it is treated as a revenue department, and not as a branch of the Civil Service. It differs from the foregoing departments in that it is directly represented in Parliament.

The Postmaster-General is a political officer appointed from time to time by Letters Patent under the Great Seal.

From the early part of the sixteenth century it would seem that postal arrangements existed, not for public convenience, but for the use of the King and his Court, and these were under a Master of the Posts. In the reign of James I and

<sup>1</sup> Formerly of Woods and Forests; see 13 & 14 Geo. V, c. 21, s. 4; S.R. & O., 1924, No. 1370, and the Crown Land Acts, 1829–1929.

Charles I posts were organized for general convenience, and from the reign of Charles II they furnished an appreciable item of the revenue settled upon the King. But until 1710 the duties were carried on by one or more persons under the supervision of a Secretary of State.

In 1710<sup>1</sup> a Postmaster-General was appointed, holding office by Letters Patent: and the office fell under the disabilities attaching to new offices by the Place Bill of 1707. Throughout the 18th century, and until 1823, the office was held usually by two joint Postmasters; since then it has been held by one person. Except for the short period of Canning's Ministry, it was always held by a peer, with a view to the Parliamentary representation of the Post Office, until in 1866 the disability was removed and the Postmaster-General rendered capable of sitting in Parliament,<sup>2</sup> subject to the rule —now abrogated—that acceptance of the office vacates the seat of the holder, leaving him eligible for re-election.

In 1831 the English and Irish Post Offices, which had until that date been under separate management, were brought under one head, and since 1837 the office of Postmaster has been regarded as political, changing hands with changes of Ministry.

The year 1837 marks an epoch in the history of the Post Office. In that year a group of Statutes<sup>3</sup> was passed, one of which repealed in its entirety the immense mass of legislation which had then accumulated about the Post Office, while another defined its privileges and conditions of management. It is the latter Act which gives a monopoly to the Post Office in the carriage of letters and newspapers: private enterprise is not allowed to compete with the Government, although in the process of crushing private competition the Post Office may be stimulated to new efforts for meeting the public convenience. In 1908 a new consolidation of the legislation was effected.

The position of the Postmaster-General is exceptional. From one point of view the office is a department of the revenue, and as a revenue department it is controlled by the Treasury. But,

<sup>1</sup> 9 Anne, c. 10, gave monopoly powers throughout the Empire.

<sup>2</sup> 29 & 30 Vict. c. 55.

<sup>3</sup> 7 Will. IV & 1 Vict. c. 32, and c. 33.

unlike other such departments which are merely concerned with collection and receipt, the Post Office transacts a business which is immense in compass and variety, which no private enterprise could transact so cheaply or conveniently to the public, and which, though conducted primarily with a view to public convenience, incidentally produces a vast revenue.<sup>1</sup> As head of a great business concern the Postmaster-General is a large employer of labour; he is also concerned in dealings with steamship and air navigation companies as regards contracts for the carriage of mails; and with international questions in respect of treaties as to postal, telegraphic, and telephone arrangements with foreign countries.<sup>2</sup> He is also therefore the head of a great administrative office, but, though he may suggest and advocate means for increasing the usefulness of his department, his powers are conferred and very precisely defined by Statutes, and their exercise, wherever it goes beyond mere regulation and touches the revenue, is subject to Treasury control.

His power to fix rates of postage where they are not settled by Parliament must be used subject to the approval of the Lords of the Treasury. So, too, Parliament gives authority for contracts for the conveyance of mails; but, if Parliament does not fix the rates, they must be settled by the Postmaster-General, with the consent of the Treasury.

His regulations as to the Post Office savings banks, and money orders, are in like manner subject to the approval of the Treasury, and the consent of that department is required to enable him to purchase, sell, or exchange land, and to purchase, lease, or regulate the business of the telegraph.<sup>3</sup>

His position is in this respect different from that of the other chiefs of great spending departments. The Treasury has a voice in the amount of the sums asked of Parliament for the various services of the army, air force, and the fleet, but the assent of the Treasury is not required to the pattern of a new

<sup>1</sup> *Post*, ch. ix, sect. 1, § 6.

<sup>2</sup> See *Parl. Deb.*, 3rd Ser. clxxxii. 1077, 1082, speeches by Childers and Gladstone on the Bill which made the office tenable with a seat in the Commons.

<sup>3</sup> References to the numerous Statutes, by which the powers of the Postmaster-General are conferred and defined, may be found in the Chronological Table and Index to the Statutes.

rifle or the design of a ship. In the department of the Postmaster-General Parliament lays down the rules of management in great detail, and leaves it to the Treasury to see that these rules are carried into effect. The Postmaster-General is no more than the acting manager of a great business, with little discretionary power except in the exercise of the very considerable patronage of his office.<sup>1</sup> He may suggest to the Government an extension of postal arrangements with foreign countries, which the King may effect by treaty: but it is only in Parliament and by legislation that he can introduce new methods for the conduct of his business, or new departments of work to be undertaken by his office. And it is from his Parliamentary position that his office derives the influence which gives it importance. He has the aid of an Assistant Postmaster-General, who may sit in the House of Commons, and a very large staff, which has been recently reorganized.

## V. THE COMMISSION OF THE ADMIRALTY

### § 1. ITS HISTORY

The Admiralty, like the Treasury, represents a great office entrusted from time to time to Commissioners appointed by Letters Patent under the Great Seal. The office is that of Lord High Admiral, and it has been in Commission since 1708, except in the year 1827-8, when for a short time the Duke of Clarence was Lord High Admiral.

But before 1832 the Commissioners of the Admiralty were not entrusted with the entire management of naval affairs: they dealt with 'the appointment and promotion of officers, the movements of ships, and the general control of the policy of the navy'.<sup>2</sup> There were two Boards subordinate to them: the Navy Board, which dealt with pay and stores, other than ordnance, or victuals, and the Victualling Board, which attended to the supply of meat, biscuit, and beer; besides these the Treasurer of the Navy, though a member of the

<sup>1</sup> Under an arrangement of 1933 £10,750,000 must be taken for general revenue; any surplus over that may on certain conditions be dealt with by the Postmaster-General for improvement of the services under his control. Cf. *Parl. Pap. Cmd. 4149* (1932).

<sup>2</sup> *Report of Royal Commission to inquire into civil and professional administration of naval and military departments*, 1890 (C. 5979), Appendix i.

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Navy Board, had a separate office; he obtained from the Treasury and paid over the sums which the Navy Board directed him to pay.<sup>1</sup>

In 1832 Sir James Graham, then First Lord of the Admiralty, obtained the passing of an Act<sup>2</sup> which abolished these two Boards and placed their duties in the hands of officers, each of whom was subordinate to a Lord of the Admiralty. Three years later the office of Treasurer was abolished, and its duties assigned to the Paymaster-General.<sup>3</sup>

Thenceforth the entire business of the Navy has been conducted under the supervision of the Admiralty Board. The Letters Patent constituting the Commission of the Admiralty, after revoking the previous Patent, appoint certain persons named to be Commissioners for executing the office of Lord High Admiral, with power to do everything which that officer might do if in existence, to discharge all the duties which had once been done by the Navy and Victualling Boards, and to make all appointments, not only professional, as the Lord High Admiral had been wont to do, but in the civil departments of the service.

It will be necessary hereafter to speak again of the Admiralty and its working in a chapter on the Armed Forces of the Crown, but at the risk of repetition some points may be mentioned here.

## § 2. ITS CONSTITUTION

The constitution of the Board as settled by Order in Council, of 10 August 1904,<sup>4</sup> now consists of the First Lord, four Sea Lords, a Deputy Chief of the Naval Staff, a Parliamentary and Financial Secretary, and a Civil Lord. The Permanent Secretary, appointed by the Board, is given the status of a member.

The Board now meets once a week, or oftener if the First Lord so pleases. In former times it met more frequently, but much administrative work is done by the Lords and Secretaries in their respective departments.

The Lords Commissioners are nominally upon an equality.

<sup>1</sup> *The Laws, &c., of the Admiralty of Great Britain, Civil and Military*, ii. 410 (published 1746).

<sup>2</sup> 2 & 3 Will. IV, c. 40.

<sup>3</sup> 5 & 6 Will. IV, c. 35.

<sup>4</sup> *Parl. Pap.*, Cd. 2416 (1905).

The Patent makes no distinction in their respective positions: the political chief of the Admiralty is only the Lord whose name stands first in the Commission. But in fact the First Lord is supreme, and for two reasons.

The First Lord has for a very long time been a member of the Cabinet. He therefore speaks to his colleagues with the force of the Cabinet behind him. If the other Lords differ from him at the Board he can say that unless his wishes are carried out he will not remain a member of the Board.<sup>1</sup> If, as would be probable, the rest of the Cabinet support the First Lord against his colleagues, the King would be advised to issue fresh Letters Patent, constituting a new Commission of the Admiralty, in which other names would be substituted for those of the dissentient members of the Board.

Again, successive Orders in Council, beginning with that of 14 January 1869, have made the First Lord responsible to the King, and to Parliament, for all the business of the Admiralty, and have, in addition, made the other members of the Board responsible to the First Lord for the business assigned to them.

By Order in Council of 10 August 1904,<sup>2</sup> the First, Second, and Fourth Sea Lords are to be responsible to the First Lord for so much of the general business of the Navy, and the movement, condition, and personnel of the Fleet, as may be assigned to them or each of them by the First Lord; the Third Sea Lord and Controller is similarly responsible for the *matériel* of the Navy; the Parliamentary Secretary for the Finance of the Department and for such other business of the Admiralty as may be from time to time assigned to him; while the duties of the Civil Lord and the Permanent Secretary are left to be assigned to them from time to time.

### § 3. DISTRIBUTION OF BUSINESS

The distribution of business rests on a Minute of the First Lord, made on 20 October 1904.<sup>3</sup> At present it is as follows:

<sup>1</sup> Report of Select Committee of the Commons on the Board of Admiralty, 1861, p. 185: Evidence of Sir John Pakington. <sup>2</sup> Cd. 2416.

<sup>3</sup> Statement showing present distribution of business between the various members of the Board of Admiralty, 1905. (Cd. 2417.)

the First Naval Lord, aided by the Deputy Chief of Staff, deals with operations and movements of the Fleet, and naval staff work generally. The Second Sea Lord with personnel, the Third with provision of ships and armaments and the work of the dockyards, the Fourth with supplies and transport. The Civil Lord is concerned with labour questions and provision of works and buildings, the Parliamentary and Financial Secretary with these issues, and the Permanent Secretary with the internal working of the office, with correspondence, and with the transaction of routine business. There is a very large naval and civil staff.

Two things may be noted about the distribution of business. The Parliamentary Secretary holds a position of considerable importance in the Ministry, though his office does not bring him into the Cabinet. He represents the Department in the Commons, if the First Lord is a member of the House of Lords.

The First Sea Lord is given a position of greater importance than formerly in the Minute of 20 October 1904. In any matter of great importance he is always to be consulted by the other Sea Lords, the Civil Lord, and the Secretaries, and though these officers have direct access to the First Lord, if they desire it, the First Sea Lord becomes, in all matters of great importance, the necessary intermediary between them and their political chief. How far he should go in subordinating their views to those of the First Lord is much disputed. From the investigation of the Dardanelles episode in the Great War it seems clear that it is not in the public interest that the views of the Sea Lords should be withheld from the Cabinet, and that it is their duty if they disagree with the First Lord to seek a Cabinet decision. It is, of course, proper that such issues should be raised in the Imperial Defence Committee.

The Admiralty is constituted with the object of securing responsibility to Parliament by entrusting the affairs of the Navy to a civilian who shall represent the department in one or other House, while care is taken to supply this civilian minister with the best professional advice. As regards the general policy of the Board this advice comes through the Sea Lords, who do not as a rule change with changes of govern-

ment: in matters of detail the First Lord has the assistance of an efficient permanent staff in all the numerous departments of naval administration.

## VI. THE BOARDS AND MINISTRIES

There is one large and distinct group of those departments of government which remain, consisting of a number of Boards, or Ministries replacing Boards, to which may be added new Ministries of like character. These, unlike the Treasury Board and the Admiralty Board, do not represent great offices put into Commission. In earlier times they would have been Committees of the Privy Council. The oldest of them, the Board of Trade, has never, strictly speaking, ceased to be a Committee of the Council: the youngest, the Board of Education, was a Committee of the Council until the year 1899. In every case the Board included, and in these cases includes, besides the President, a number of great officials, usually the President of the Council, the Secretaries of State, and the Chancellor of the Exchequer. The President, except in the case of the Board of Works, is appointed by Order or Declaration in Council; the Board is a phantom; the President, though by its statutory constitution he would play a minor part among the great officers of State of whom the Board consists, is, in fact, the sole head of his department. The Boards were not merely indications of the diminished administrative importance of the Council: they mark also the increased activity of the State in compelling or controlling the action of the individual in many departments of human affairs.

### § 1. THE BOARD OF TRADE

This Board has a long history. In 1660 Charles II created two Councils, one for Trade and one for the Foreign Plantations. They languished and died in 1665. But in 1668 and 1670 they were resuscitated, and for economy were combined under one Commission in 1672; on its being revoked in 1675, the control of trade returned to the Privy Council. In 1696 the Board of Trade and Plantations was created. This Board

was abolished in 1782.<sup>1</sup> The sarcasms of Burke<sup>2</sup> on its costliness and inefficiency were doubtless justified; but the Board had difficulties from a want of executive power, which in part accounted for its incapacity. It could collect information and make suggestions to the Secretary of State for the Southern Department, but it could do no more, and in the hands of persons not naturally very zealous to give a return of work for their salaries, it became an expensive machine for making inquiries which were seldom made, and for having in readiness advice which was seldom asked for. From 1782 until the present time the Board of Trade has been a Committee of the Privy Council. An Order in Council of 23 August 1786, never since revoked, constitutes a Committee of the holders of certain high offices, conspicuous among whom are the Archbishop of Canterbury and the Speaker of the House of Commons. A President and, until 1867, a Vice-President were from time to time appointed in Council, and individuals were added to the Committee for special purposes.<sup>3</sup> The Committee very rarely met, and its duties were discharged by the President and Vice-President.

In 1862 it was enacted that this Committee of Council should henceforth be described as the Board of Trade, and the Board is defined in the Interpretation Act, 1889, as 'the Committee of the Privy Council appointed for the consideration of matters relating to Trade and Plantations';<sup>4</sup> in 1867 the Vice-President ceased to exist, and a Parliamentary Secretary was appointed. The President<sup>5</sup> and Secretary are both capable of sitting in the House of Commons.

The duties of the Board before 1840 were almost entirely consultative; it collected statistics on the subject of trade, and was ready to offer advice to the Foreign Office on the subject of commercial treaties, and to the Colonial Office on

<sup>1</sup> 22 Geo. III, c. 82, s. 1; s. 15 transferred its powers to such Committee of the Privy Council as might be appointed.

<sup>2</sup> Burke, *Speech on Economical Reform*; but see *Life of Shelburne*, by Lord E. Fitzmaurice, i. 240; Keith, *Const. Hist. of First British Empire*, pp. 273-7.

<sup>3</sup> See Return to an Order of the House of Commons for 1871 (482).

<sup>4</sup> 24 & 25 Vict. c. 47, s. 65, and see 52 & 53 Vict. c. 63, s. 12.

<sup>5</sup> The provision to this effect in 7 Geo. IV, c. 32 was inadvertently repealed by the Board of Trade Act, 1909, s. 23, but the error was validated and all holders of the office indemnified by 22 Geo. V, c. 21.

questions arising out of our dealings with the colonies ; a relic of its old duties was the formal reporting on all colonial laws. In 1840 it began to acquire its modern executive functions ; it was then for the first time called upon to settle and approve the by-laws of railway companies. Its duties in this respect grew, and for some time the department had a double aspect. It was the Committee of Council for trade and foreign plantations ; in this capacity the Committee was specially constituted to consider and report to the Colonial Office upon the constitutions proposed for our colonies in Africa and Australia.<sup>1</sup> It was also the Board of Trade, and in this capacity the President and Vice-President exercised an administrative control over railways, harbours, and other matters committed to the Board by Statute. Gradually the consultative functions dwindled, and the administrative functions grew. In 1865, after some discussion as to the relation of the Foreign Office and the Board of Trade, the former department established a new division to carry on correspondence in commercial matters, not only with the Board of Trade but with representatives of foreign powers in England ;<sup>2</sup> and a few years later, in 1872, the consultative branch of the Board wholly disappeared.<sup>3</sup>

We have then to consider what are the duties of the Board. They are now mainly executive and regulative rather than advisory.

The part of its present work which most nearly represents the old functions of the Board as an adviser in trade and colonial matters is the statistical and commercial department. The Board collects and publishes the statistics of the trade and shipping of the United Kingdom, the Empire overseas, and foreign countries. Here too is kept a register of the rates of duty levied by foreign countries on British goods. In general it may be said that persons in search of statistical information on the subject of trade and navigation, in the United Kingdom, will obtain it at the Board of Trade. Moreover, its commercial functions have been widely extended by the adoption of protection and preference policies in 1931.

<sup>1</sup> *Parl. Deb.*, 3rd Ser. cvi. 1120.

<sup>3</sup> *Ibid.* ccix. 1150.

<sup>2</sup> *Ibid.* clxxvii. 1880.

It has authority under the Import Duties Act, 1932, to impose special duties on countries which discriminate against British trade, and such an Order adding 20 per cent. duty on many French imports was made in February 1934;<sup>1</sup> as a result of this action France agreed to cease discrimination and the Order was revoked. It was active in procuring the Ottawa Agreements of 1932 and in negotiating a large number of trade agreements from 1932 on.

Beyond this it may be said that wherever the State regulates trade in the interest of the public safety, convenience, or profit, it is represented by the Board of Trade.

In some matters the Board exercises ancient royal prerogatives transferred by Statute to departments of government. In others it represents the modern activity of the State.

The ancient claim of the Crown to create monopolies in the buying, selling, making, or using commodities was limited by an Act of James I to the grant of Letters Patent for the exclusive use of new inventions.<sup>2</sup> This prerogative has been regulated by subsequent Statutes: and the grant of patents, together with the registration of designs and trade marks, matters involving international agreements,<sup>3</sup> is now placed under the superintendence of the Board of Trade, which controls the Patents office.

Upon the commercial department is thrown the duty of keeping the standard of weights and measures, formerly the business of the Exchequer. The entire machinery of Bankruptcy, apart from the consideration of legal questions, is in the hands of the Board;<sup>4</sup> so is the registration of Joint Stock Companies,<sup>5</sup> conducted by a separate office, but one included in the railway department, of which something must be said.

The powers and privileges conferred upon companies which provide things of indispensable use or convenience were, and in part still are, generally speaking, exercised under the control of the Board.

Such bodies are railway and tramway companies, now

S.R. & O., 1934, no. 83. On the vast accumulation of Statutes whence the Board derives its powers, the Chronological Table and Index to the Statutes, and the Index to the S.R. & O., must be referred to.

<sup>2</sup> 21 Jac. I, c. 3.

<sup>3</sup> 7 Ed. VII, c. 29; 9 & 10 Geo. V, c. 80; 18 & 19 Geo. V, c. 3; 22 & 23 Geo. V, c. 32.      <sup>4</sup> 4 & 5 Geo. V, c. 59.      <sup>5</sup> 19 & 20 Geo. V, c. 23.

largely under the control of the Ministry of Transport,<sup>1</sup> gas and water companies. They are in possession of a practical monopoly of things which man cannot do without—light, water, and the means of locomotion. The State entrusts to the Board of Trade the task of seeing that these bodies act with due regard to the interest and to the safety of the public. Safety would seem to have been the main object of the control, now transferred to the Minister of Transport, exercised by the Board over electric lighting.

The control is exercised in various ways. Where legislation by private bill or provisional order is required to effect the objects of the company, a government department can effectively intervene. When the company is in possession of its powers, it is controlled by inspection of works, by approval of by-laws and regulations, by inquiry into accidents.

The Harbour department is one in which the Board exercises an ancient royal prerogative. The soil of ports and navigable rivers was, under the feudal land law, vested in the Crown. This right of ownership involved a duty to secure the safety of the country from hostile invasion and the due payment of revenue arising from the Customs.

These prerogatives reappear in the departments of government which have charge of ports. The Treasury and the Commissioners of Customs determine what shall be landing-places for merchandise,<sup>2</sup> the Board of Trade has charge of harbours, subject to the intervention of the Admiralty where national safety is concerned, and of the Commissioners of Crown Lands, as regards the pecuniary interests of the Crown in the soil.<sup>3</sup> Closely connected with its responsibility for the maintenance of harbours is the control exercised by the Board over the bodies to whom is entrusted the business of managing lighthouses,<sup>4</sup> and the funds for their maintenance. The power of regulating sea and fresh-water fisheries has been transferred to the Board, now Ministry, of Agriculture.<sup>5</sup>

<sup>1</sup> 9 & 10 Geo. V, c. 50.

<sup>2</sup> 10 & 11 Vict. c. 27, s. 24.

<sup>3</sup> 25 & 26 Vict. c. 69.

<sup>4</sup> These are the Trinity House in England, the Commissioners of Northern Lighthouses in Scotland, and the Commissioners of Irish Lighthouses for Ireland; the latter can now be superseded by Irish Free State authorities.

<sup>5</sup> 3 Ed. VII, c. 31.

The Mines Department of the Board has a Parliamentary Secretary. It has wide powers under the Mining Industry Act, 1920, and the Coal Mines Act, 1930. The Secretary appoints under the latter Act the Members of the Coal Mines National Industrial Board, and the Coal Mines Reorganization Commission, charged with the duty of securing rationalization of the industry, which is drastically controlled as regards output and arrangement for export.

The Marine department offers a very complete representation of State control over commercial transactions.

A merchant ship when built is measured, her name entered with a description of her in the books of the Board, and a certificate of registry given to her owner which is henceforward the evidence of her identity and nationality; the register is, in addition, the owner's title, and this does not merely put his title under the protection of a department of government, it enables him by a change of the registered name to sell and convey his ship to another with the minimum of expense.

The safety of ship and crew is the next concern. 'The officers of a merchant ship are required to pass examinations in technical proficiency, and to produce evidence of character; they then receive certificates enabling them to act as masters, mates, and engineers.'<sup>1</sup> Certain rules are made and enforced by the Board for the conduct of officers and men, for the settlement of disputes, and for the discharge of the crew, with their due wages if at home, with means of return if discharged abroad.

Besides securing that the ship shall be competently officered and manned, the Board makes rules as to the number of passengers, the lights to be shown, and the boats to be carried, the position in the ship of certain sorts of cargo; and its equipment with wireless telegraphy; it is further invested with power to detain ships which are suspected of being unfit to go to sea.<sup>2</sup> The Board is also vitally concerned with the conclusion and execution of international arrangements as to

<sup>1</sup> Sir T. Farrer, *The State in its Relation to Trade*, p. 123.

<sup>2</sup> In this regard it is subject, contrary to normal usage, to suit by persons aggrieved; *Thomson v. Farrer* (1882), 9 Q.B.D. (C.A.) 372. Contrast *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K.B. 343; *Grech v. Board of Trade* (1923), 130 L.T. 15.

safety of life at sea<sup>1</sup> and conventions as to collision damage, salvage, carriage of goods at sea, &c.

The Finance department of the Board is the outcome of all the above-mentioned duties. The staff required to effect this elaborate supervision, the maintenance of harbours and of lighthouses, the arrangements for merchant seamen's savings banks, money orders, pensions for the relief and conveyance home of distressed seamen, for the custody and transmission of the wages and effects of deceased seamen—all these matters involve not merely the keeping of accounts, but the administration of funds. The financial business of the Board involves therefore considerable labour and some cost.

## § 2. THE COMMISSIONERS OF WORKS AND PUBLIC BUILDINGS

The Department of Works traces its origin to the control provided for the expenditure on royal buildings which at one time fell entirely upon the Civil List.

In 1782<sup>2</sup> these were placed under the control of a Surveyor of Works, who was to be an architect, and regulations were made as to outlay on new buildings and repairs. In 1814<sup>3</sup> a Surveyor-General was appointed 'for His Majesty's works and public buildings', whether provided out of the Civil List or by Parliamentary grant.

In 1832<sup>4</sup> the work of the Surveyor-General was taken from him and entrusted to a department of revenue, the Commissioners whose duty it was to manage the Woods, Forests, and Land Revenues of the Crown.

These Commissioners, as was inevitable, applied the proceeds of the Crown lands to the repair of buildings and the maintenance of the public parks, and they did this without Parliamentary sanction. In 1851<sup>5</sup> these departments were severed. The salaries of the Commissioners of Woods and Forests were brought into the annual votes for Civil Service expenditure, and the revenues which they collected were to pass into the Exchequer. A new department, the Board of Works and Public Buildings, was created, consisting of a First Commissioner, the Secretaries of State, and the Presi-

<sup>1</sup> 22 & 23 Geo. V, c. 9.

<sup>2</sup> 22 Geo. III, c. 82, ss. 6, 7, 8.

<sup>3</sup> 54 Geo. III, c. 157.

<sup>4</sup> 2 & 3 Will. IV, c. 1.

<sup>5</sup> 14 & 15 Vict. c. 42.

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dent of the Board of Trade. The Commissioners must apply to Parliament for funds to carry out any public improvement. The First Commissioner may sit in the House of Commons.

The First Commissioner is appointed by warrant under the royal sign manual: he acts alone; the Board never meets unless it should so chance that the office of First Commissioner was vacant and business had to be done.

The First Commissioner has charge of royal palaces and parks, and beyond this he has charge of the fabric and furnishing of all public buildings, including the Palace of Westminster, and oversea legations, unless these should be specially assigned to any other department. He controls the Crown interests in Epping Forest,<sup>1</sup> administers the Acts regarding the Geological survey,<sup>2</sup> can erect or repair statues<sup>3</sup> in the metropolitan police district, and controls ancient monuments.<sup>4</sup>

### § 3. THE MINISTRY OF HEALTH

The Local Government Board was the creation of an Act of 1871,<sup>5</sup> by which the powers possessed by the Privy Council, by the Home Secretary, and by the Poor Law Board in respect of public health, local government, and the administration of the poor law, were transferred to a Board consisting of the Lord President of the Council, the Secretaries of State, the Lord Privy Seal, the Chancellor of the Exchequer, and a President, to be appointed by an Order in Council and to hold office during pleasure.

To this Board was given power to appoint Secretaries, Inspectors, and the necessary staff, with the sanction of the Treasury. The President and one of the Secretaries were made eligible for a seat in the House of Commons. As we shall have to deal hereafter<sup>6</sup> with the government of the United Kingdom, central and local, it is only necessary to say here that the Board did not meet, and that responsibility for the conduct of its business was vested in the President and Parliamentary Secretary. In 1919<sup>7</sup> the Board was replaced by

<sup>1</sup> 29 & 30 Vict. c. 62, s. 6.

<sup>2</sup> 8 & 9 Vict. c. 63.

<sup>3</sup> 17 & 18 Vict. c. 33.

<sup>6</sup> Ch. vii, sect. 1, § 5.

<sup>4</sup> 3 & 4 Geo. V, c. 32; 21 & 22 Geo. V, c. 16.

<sup>5</sup> 34 & 35 Vict. c. 70.

<sup>7</sup> 9 & 10 Geo. V, c. 21; Sir A. Newsholme, *The Ministry of Health*.

a Ministry of Health, on whom were conferred its powers,<sup>1</sup> those of the Insurance Commissioners, and the powers as to health matters of other departments.

#### § 4. THE MINISTRY OF AGRICULTURE AND FISHERIES

The Board of Agriculture dated from the year 1889.<sup>2</sup> Like its brethren the Boards of Trade, Local Government, and Works, it consisted of a number of distinguished persons who never met, of a President, who might sit in the House of Commons, as its political chief, and a permanent staff. A Parliamentary Secretary was authorized in 1909.<sup>3</sup>

It did not represent to any great extent a new interference by the State with the ordinary business of life. The Act which constituted it did no more than assign to a Board powers exercised by various bodies, created a new office so as to enable the exercise of those powers to be represented and criticized in Parliament, and imposed a duty to promote the studies of agriculture and forestry by collecting and publishing statistics—a power since widely extended,<sup>4</sup> by assisting courses of instruction, and by inspecting schools in which such instruction is given.

The Board of Agriculture acquired powers from three sources. From the Privy Council it took the powers, given in 1877, for the destruction of the Colorado beetle, and by various subsequent Acts for preventing the spread of contagious disease among animals. The only new power of this sort created by the Act of 1899 was a control with which the Board was invested over dogs for the purpose of muzzling them at its pleasure, or making rules for their detention or even destruction if they stray.

Perhaps the most important were the powers taken over from the Land Commissioners, who, having themselves accumulated the powers and duties of other Boards, were wholly absorbed and disappeared in the Board of Agriculture. The commutation of tithe, the enfranchisement of copyhold, and the enclosure of commons took place under the provisions of various Statutes, the operation of which was subject to the

<sup>1</sup> Those relating to elections were transferred to the Home Secretary; S.R. & O., 1921 (No. 959), p. 291.

<sup>3</sup> 9 Ed. VII, c. 15.

<sup>2</sup> 52 & 53 Vict. c. 30.

<sup>4</sup> 15 & 16 Geo. V, c. 39.

control of bodies of Commissioners. So, too, were the powers of limited owners of real property to pledge the credit of the land which they enjoyed for drainage or other purposes of improvement, or to employ for like purposes the produce of sale of such property effected under the Settled Land Act. So, too, were the powers of the Universities and the Colleges therein to deal with property in the management of which the public was supposed to have an interest. All these powers had been concentrated in a body of Commissioners, who were not represented in Parliament.

From the Board of Trade are taken, by an Act of 1903, powers and duties in respect of the fishing industry:<sup>1</sup> and the King may, by Order in Council, transfer to the Board of Agriculture any powers and duties of a Government Department which appear to relate to agriculture, to forestry,<sup>2</sup> or to the industry of fishing.<sup>3</sup> In 1919<sup>4</sup> the Board was converted into a Ministry and its duties have enormously increased since 1931 by the adoption of protection for industry and its extension to agriculture and fisheries. It supervises the development of marketing schemes under the Acts of 1931 and 1933,<sup>5</sup> which aim at control and regulation of most important products, and is responsible for the operation of the Wheat Act, 1932. It deals with the fixing of agricultural wages by a Central Board and local Committees. It promotes small holdings and land settlement.

### § 5. THE BOARD OF EDUCATION

This department of government illustrates the extent of State interference in a matter which seems so essentially one of private judgment as the education of children.

<sup>1</sup> 3 Ed. VII, c. 31. These duties may seem incongruous, but Lord Onslow, the President of the Board, urged that the department which had the care of the loaves should also be entrusted with the fishes; *Parl. Deb.*, 4th Ser. ccxxiv. 222; 23 June 1903.

<sup>2</sup> Forestry has by the Forestry Act, 1919, been handed over to eight Forestry Commissioners, who are appointed by sign manual warrant, and incorporated by Charter (S.R. & O. 1920 (No. 646), i. 748). They receive a Parliamentary grant, but are subject only to a certain amount of Treasury control. The control of Crown woods has been transferred to them from the Commissioners of Crown Lands; 13 & 14 Geo. V, c. 21, s. 1.

<sup>3</sup> 52 & 53 Vict. c. 30, s. 4; 3 Ed. VII, c. 31, s. 1 (3).

<sup>4</sup> 9 & 10 Geo. V, c. 91.

<sup>5</sup> 21 & 22 Geo. V, c. 42; 23 & 24 Geo. V, c. 31.

When first the State came in contact with education, in 1833, it contributed, by a grant of £20,000 a year, administered through the Treasury, sums in aid of voluntary contributions for public elementary education. In 1839 the grant was enlarged to £30,000, and the duty of administering it was transferred to a Committee of the Privy Council. This Committee developed into a department, and in 1856 the Queen was empowered by 19 & 20 Vict. c. 116 to appoint a Vice-President of the Committee of the Privy Council on Education, who should be capable of sitting and voting in Parliament. Thus was created a Minister of Education, responsible to Parliament. The duties of this Minister have increased with the increased insistence of the State on the education of its citizens.

The Act of 1870<sup>1</sup> put compulsion upon every school district to provide school accommodation for its children, either by voluntary effort, or by the creation of a School Board and the imposition of a rate. The Act of 1876<sup>2</sup> imposed a duty on the parent of every child to cause that child to receive efficient instruction in reading, writing, and arithmetic. The Act of 1902<sup>3</sup> placed elementary education under the authority of municipal bodies, the councils of counties, and of boroughs and urban districts of a given population, and required all elementary schools, whether voluntary<sup>4</sup> or rate-provided, to be maintained out of rates supplemented by a Parliamentary grant amounting to about £2 2s. per child. As the State contributes so largely to the maintenance of the schools, it exercises a corresponding control over their conduct. Unless the conditions laid down in the Grant Regulations made from time to time by the Board, are complied with, the grant sanctioned by Parliament is not forthcoming in respect of the delinquent school. Voluntary aid has dropped out, except for keeping up the fabric of voluntary schools, and, while the burden on the ratepayer is heavy, the taxpayer contributed a sum of over fifty-one millions in 1933-4 towards the cost of education.

<sup>1</sup> 23 & 24 Vict. c. 75.      <sup>2</sup> 39 & 40 Vict. c. 79.      <sup>3</sup> 2 Ed. VII, c. 24.

<sup>4</sup> Such schools enjoy the privilege of management by bodies, a majority of whom are not appointed by the local authorities, and in them denominational religious instruction is given to all pupils whose parents do not object. In other schools undenominational instruction only is allowed.

The constitution of the Board concerns us. Until 1899 it was a Committee of the Privy Council, but its chief was the Lord President of the Council, not, as in the case of the Board of Trade, a President for that particular Committee. Nor has the course of its history followed that of the Board of Trade. It has wholly ceased even in theory to be a Committee of the Council, and has become a Board similarly constituted to the former Board of Agriculture and the Local Government Board. It possesses a Parliamentary Secretary as well as a President, and this is necessary, for the Board needs to be represented in both Houses, since both take an amount of interest in educational details which is sometimes embarrassing to the Parliamentary representatives of the department. If both President and Parliamentary Secretary are in the House of Commons, the Lord President of the Council normally attends to the business of the department in the House of Lords and is prepared to take responsibility for its action.

The Act of 1899 provided for a Consultative Committee, which, as defined by Order in Council, 22 July 1920, is continued in being by the Education Act, 1921.

The Board of Education Act, 1899,<sup>1</sup> made it lawful for the Crown in Council, by Order, to transfer to the Board any powers of the Charity Commissioners relating to education, and under Orders made in pursuance of this Act the powers exercised by the Charity Commission under the Endowed Schools Acts have been so transferred.<sup>2</sup> Hence the Board is enabled to frame, approve, and amend schemes for the use of educational endowments where lapse of time and change of circumstance have combined to render useless, or even harmful, the application of his property contemplated by the founder. It rests with the Charity Commissioners to determine whether an endowment or any part of it is held or should be applied for educational purposes.<sup>2</sup>

The Education Acts of 1902-3,<sup>3</sup> and 1918 now consolidated with changes in the Education Act, 1921, have given

<sup>1</sup> 62 & 63 Vict. c. 33, s. 2.

<sup>2</sup> Orders in Council, 7 Aug. 1900, 24 July 1901, 11 Aug. 1902.

<sup>3</sup> 2 Ed. VII, c. 42; 3 Ed. VII, c. 24; 8 and 9 Geo. V, c. 39; 11 & 12 Geo. V, c. 51. See Sir L. A. S. Bigge, *The Board of Education*.

large powers to Local Authorities, acting through Education Committees, over all forms of education within their areas; but to discuss the nature and extent of these powers would involve an incursion into the field of Local Government.

But the relations of the Board of Education to these bodies need to be touched upon here. In elementary education there exists considerable administrative control. The Local Authority must maintain the number of schools requisite for the children of the area, and, in order to earn the money granted by Parliament for the maintenance of the schools, must comply with the conditions of the Code. The Education Code, 1926, annually reissued, lays down regulations as to the subjects to be taught, the qualifications of teachers, the staffing of schools, and the dimensions and sanitary condition of the school buildings.

The powers of the Board in respect of education other than elementary, apart from those which it has taken over from the Charity Commission, depend for their extent almost entirely upon the funds at its disposal. By the offer of grants of money to secondary or continuation schools and other educational institutions, for further or adult education, conditioned on their satisfying the requirements of the Board, the types of instruction given may be determined, and the action of Local Authorities guided by the policy of the Board. Special provision is made for the case of blind, defective, epileptic, and deaf children.

A registration council was provided for in 1907; it was reconstituted in 1926. By grant regulations the Board in effect controls training, qualifications, tenure of office, and under Statute controls a contributory superannuation scheme.

But it must not be supposed that the Board of Education is the only department concerned with educational subjects. The Home Office has the control of the approved (formerly industrial) schools, day or residential. These are for children found begging or destitute, or in bad company, or convicted of a criminal offence, or beyond the control of their parents in persistent truancy from school.<sup>1</sup> Medical inspection of

<sup>1</sup> 29 & 30 Vict. c. 118, Industrial Schools Act; 1 Ed. VII, c. 20, Youthful Offenders Act; superseded by the Children and Young Persons Act, 1933; S.R. & O., 1933, No. 744.

The Treasury makes grants to Universities and University Colleges, and these are determined in respect of amount and conditions by the Chancellor of the Exchequer on the advice of a University Grants Committee. Lastly, the Civil Service Commissioners, by determining the character of the examination for the higher branches of the Civil Service, can exercise an appreciable effect on the teaching of the Universities and the public schools.

It must be admitted that the relations of the State to our educational system, though the Act of 1921 has done much to give them force and reality, are still unsystematic and incomplete.

#### § 6. THE MINISTRIES OF LABOUR, PENSIONS, AND TRANSPORT

The New Ministries and Secretaries Act, 1916, provided for the creation of a Ministry of Labour, under a minister, aided by a Parliamentary Secretary. The Ministry is concerned with labour exchanges, trade boards, unemployment insurance,<sup>2</sup> and industrial conciliation. In part the powers of the minister were taken over from the Board of Trade,<sup>3</sup> in part they are new powers. He appoints the members of the Industrial Court which exists in order to settle on a voluntary basis industrial disputes, and those of special courts of inquiry into trade disputes.<sup>4</sup>

The Ministry of Pensions Act, 1916, created a Ministry with a minister and a Parliamentary Secretary. The minister is assisted by a Special Grants Committee<sup>5</sup> and a Central Advisory Committee.<sup>6</sup> He is the central authority for all

<sup>1</sup> 11 & 12 Geo. V, c. 51, s. 80.

<sup>2</sup> 10 & 11 Geo. V, c. 30, s. 47, and now 24 & 25 Geo. V, c. 29, which places on him the duty of providing relief for able-bodied persons without means of subsistence.

<sup>3</sup> For the transfer see S.R. & O., 1917, Nos. 46, 666; 1919, Nos. 184, 1667; 1925, No. 1261; 1927, No. 677.

<sup>4</sup> Industrial Courts Act, 1919, ss. 1, 4.

<sup>5</sup> 7 & 8 Geo. V, c. 37, s. 2; 8 & 9 Geo. V, c. 57, s. 8.

<sup>6</sup> War Pensions Act, 1921, s. 3.

issues concerning war pensions, and is entitled to the aid of the Parliamentary and Financial Secretary of the Admiralty, the Financial Secretary of the War Office, and the Parliamentary Secretary of the Ministry of Health.<sup>1</sup>

The Ministry of Transport owes its existence to the Ministry of Transport Act, 1919. The minister may be aided by a Parliamentary Secretary. He is essentially charged with the improvement and development of means of transport, and for this purpose the duties of other government departments in respect of transport have been transferred to him. The topics transferred include railways; light railways; canals, waterways, and inland navigation; tramways; roads, bridges, and ferries; vehicles and traffic; and harbours, docks, and piers. With the concurrence of the Board of Trade he appoints the Electricity Commissioners,<sup>2</sup> through whom he may exercise his powers under the Electricity (Supply) Act, 1919, and the Central Electricity Board. This body consists of a Chairman and seven members, appointed for from five to ten years, and its members may not sit in the House of Commons.<sup>3</sup> Though he is not responsible for appointing the members of the London Passenger Transport Board, he may remove members,<sup>4</sup> and he has important powers of making regulations under the London Passenger Traffic Act, 1933, and of regulating traffic of all kinds under the Road Traffic Act, 1930.<sup>5</sup> He also appoints the members of the Appeal Tribunal which under the later Act of 1933 deals with appeals from the licensing authorities for vehicles created by that Act.<sup>6</sup> The minister, by a departure from the normal practice, is liable officially to suit in tort and in contract,<sup>7</sup> and is responsible at law for the acts and defaults of the officers, servants and agents of the ministry as if such persons were his own servants. Costs may be awarded against him. It may be presumed that his liability extends only to acts within the sphere of authority of the servants in question.

<sup>1</sup> Ministry of Pensions Act, 1916, s. 1.

<sup>2</sup> Electricity (Supply) Act, 1919, ss. 1, 39.

<sup>3</sup> Electricity (Supply) Act, 1926.

<sup>4</sup> 23 Geo. V, c. 14, s. 1 (6).

<sup>5</sup> 20 & 21 Geo. V, c. 43, modified by 24 & 25 Geo. V, c. 50.

<sup>6</sup> 23 & 24 Geo. V, c. 53, s. 15.

<sup>7</sup> Ministry of Transport Act, 1919, s. 26 (1).

## VII. MISCELLANEOUS, SUBORDINATE, AND NON-POLITICAL OFFICES

### § 1. THE CHANCELLOR OF THE DUCHY OF LANCASTER

The Chancellor of the Duchy of Lancaster is the representative of the Crown in the management of its lands in the Duchy of Lancaster, the property of which is not confined to Lancashire but is scattered over various counties, and in the control of the courts in the County Palatine of Lancaster.

These lands and privileges have always been kept separate from the hereditary revenues of the Crown, though the inheritance by a charter of Henry VII authorized by Parliament is vested in the King and his heirs.<sup>1</sup> The palatine rights of the Duke of Lancaster were distinct from his rights as King; writs and indictments ran in his name; the peace of the County was his peace and not the King's; the Courts were his Courts and he appointed the Judges. The Judicature Act, 1873, has left only the Chancery Court of the County, but the Chancellor appoints and can dismiss the County Court Judges and their subordinates within the limits of the County. Beyond this he is responsible for the management of the land revenues of the Duchy, which are the private property of the Crown, and he has charge of the Seal of the Duchy. He is appointed by Letters Patent, and his salary comes from the revenues of the Duchy and not from the Consolidated Fund.

In fact the office, except for some formal business, is a sinecure, since the judicial and estate work of the Duchy is done by the Vice-Chancellor and subordinate officials. The Chancellor is usually a minister whose advice or assistance is useful to a government, although he may from health or other reasons be unable to undertake the charge of an exacting department.

### § 2. THE LAW OFFICERS OF THE CROWN

The King cannot appear in his own Courts in person to plead his cause where his interests are concerned. So from

<sup>1</sup> Hardy, *Charters of the Duchy of Lancaster*, pp. 341, 346; *Lancaster (Duchy) Case* (1561), 1 Plowd. 212, 220; *Att. Gen. of the Duchy of Lancaster v. Devonshire (Duke)* (1884), 14 Q.B. D. 195. The distinction between the County Palatine and the Duchy, which has some importance in private law (Halsbury (2nd ed.), vi. 838 f.), is of no constitutional interest, and therefore is not discussed here.

very early times he has used the service of an Attorney, or agent, to appear on his behalf. The list of Attorneys-General begins early in the reign of Edward I. The Solicitor-General, whose title and date of appearance have, without ground,<sup>1</sup> suggested that he represented the King in matters arising in the Chancery, appears first in the reign of Edward IV. It is essential in practice that both should be in Parliament.

These law officers are not only the legal advisers and representatives of the Sovereign: they are at the service of the State where offences against the good order of the community are not left to a private prosecution but are dealt with by the Government of the day; they, at the instance of private persons, may intervene to vindicate rights of the public.

The Government may call for their advice, and so may each department of government; they are expected to defend in the House of Commons the legality of ministerial action if called in question.<sup>2</sup> They are not necessarily or until recent years usually Privy Councillors, but they receive a writ of attendance, together with the Judges, to the House of Lords at the commencement of every Parliament.<sup>3</sup>

The Crown, or it is more true to say the Government, has its legal advisers for Scotland and for Northern Ireland: the Lord Advocate and Solicitor-General for Scotland, the Attorney-General for Northern Ireland. The Lord Advocate and the Irish law officer are Privy Councillors. The Solicitor-General for Scotland is not always in Parliament.

The law officers of the Crown play a various part. They are the legal advisers of the Crown, the Ministry, and the departments of government; they are members of the Ministry, though never until 1912<sup>4</sup> of the Cabinet, and come and go with the change of party majorities; they are members

<sup>1</sup> Holdsworth, *H.E.L.* vi. 469 f.

<sup>2</sup> e.g. the deportation of Art O'Brien which was held to be illegal in *R. v. Secretary of State; O'Brien, Ex parte*, [1923] 2 K.B. 361. The relations between the Cabinet or Ministers and law officers as regards public prosecutions were discussed in the House of Commons, Oct. 8, 1924.

<sup>3</sup> See vol. i: *Parliament*, p. 59, *ante*.

<sup>4</sup> The Attorney-General is now occasionally in the Cabinet, but not so far any Solicitor-General. In 1913 for the first time both were in the Privy Council; A. Fitzroy, *Memoirs*, ii. 504. In the Cabinets of 1929 and 1931 the Attorney-General was not included, and it is sometimes held that it is undesirable that he should sit in the Cabinet.

of the House of Commons, and responsible to Parliament for the advice given to the Crown and its servants ; they are the chiefs of the legal profession in their respective countries, and in England and Northern Ireland represent the Bar when the Bar takes collective action.

### § 3. SUBORDINATE OFFICES

Most of the Parliamentary heads of departments have the assistance, in administration and debate, of a Parliamentary subordinate ; and even in the case of those offices which appear to be single-handed, provision is made for their representation in the House of which the political chief is not a member.

The First Lord of the Treasury is, almost always, the Leader of the House of Commons, and one of his most onerous duties is the arrangement of the business of the House. He is expected to ensure the passing of a certain number of Bills which the Government of the day consider it necessary to pass, either in the fulfilment of promises made at a past general election, or with a view to the prospects of an approaching general election, or because they are needed for the advantage of the country. If he is to secure the legislation which he requires he must appropriate to the best advantage the amount of Parliamentary time which is at the disposal of the Government. In doing this the First Lord must rely on the assistance and advice of the Parliamentary Secretary to the Treasury who is *ex officio* the chief Whip of the party in power. He knows, or should know, the extent to which the habitual supporters of the Government can be relied on to aid the passing of Government Bills, what questions may arise which would have a tendency to divide the party, and how far the Leader of the House can tax the loyalty of his followers, if he should call upon them to sit for long or late hours, or to forgo the time which would ordinarily be given to occupations other than Parliamentary.

The Parliamentary Secretary is for these purposes the essential assistant of the Leader of the House, but the Leader must be a man of strong character and business capacity if he would not have the Secretary mould the destinies of the party. The Financial Secretary to the Treasury assists the

Chancellor of the Exchequer as we have described in an earlier part of this chapter.

Every Secretary of State has the assistance of an Under Secretary. The Presidents of the Boards of Trade and Education, and the Ministers of Health, Labour, Transport, Agriculture and Fisheries, and Pensions, have each a Parliamentary Secretary. An Under Secretary is appointed by letter from the Secretary of State; a Parliamentary Secretary by a minute of the Board, which for these purposes is the President, or by the minister. Beyond this difference in the mode of appointment, and the fact that the Under Secretary sometimes receives a somewhat larger salary than the Parliamentary Secretary, there is no difference in their duties. The subordinate who represents his department single-handed in the House of Commons has necessarily harder work, and a position of greater responsibility and influence, than the subordinate whose chief is with him in the Commons, or even than the subordinate who is single-handed in the House of Lords. But this feature of their political life is common to the Under Secretary and the Parliamentary Secretary.

The War Office has a larger Parliamentary staff, and so has the Admiralty. The Secretary of State for War is assisted by a Financial Secretary as well as by an Under Secretary. The First Lord of the Admiralty by a Parliamentary and Financial Secretary as well as by a Civil Lord. The Commissioners of Works, if their political chief were in the House of Lords, might be represented in the Commons by two of the Junior Lords of the Treasury; the Financial Secretary to the Treasury used to represent the Post Office if the Postmaster-General was a peer.

Irish business used to be dealt with in the House of Lords by the Lord Lieutenant; it is now the province of the Secretary of State for Home Affairs as regards Northern Ireland and of the Dominions Secretary as regards the Irish Free State. The Lord President,<sup>1</sup> Lord Privy Seal, and Chancellor of the Duchy need no Parliamentary assistance.

<sup>1</sup> Before the passing of the Board of Education Act, 1899, the Lord President of the Council would represent the Education Office in the House of Lords, and he may do so now if the Board is otherwise unrepresented in that House. The Act provides that the President of the Board and the President of the Council may be the same person.

The Parliamentary Under Secretaries are not considered as holding office under the Crown. They do not kiss hands or go through any other formality on their appointment, nor did the acceptance of such office vacate their seats, though the number who can sit in the Commons is limited to six.<sup>1</sup>

#### § 4. MINISTERS AND CABINET

The offices which necessarily bring their holders into the Cabinet used not to be more than ten in number. Now the First Lord of the Treasury, the Lord Chancellor, the Lord President, the eight Secretaries of State, the Chancellor of the Exchequer, and the First Lord of the Admiralty, must be members of every Cabinet, though the Chancellor of the Exchequer was not considered essential to a Cabinet at the beginning of the last century, nor the First Lord of the Admiralty at the beginning of the eighteenth.<sup>2</sup> The Lord Privy Seal normally holds an office of Cabinet rank, and Trade, Labour, Health, Agriculture, and Education have now acquired a prescriptive right to representation in the Cabinet. The Chancellor of the Duchy of Lancaster, the Minister of Transport, the Postmaster-General, and the First Commissioner of Works, may or may not be in the Cabinet; this would depend on the importance of the holder of the office, or on the willingness of a Prime Minister to gratify his supporters in the Ministry.

The size of Cabinets tends to increase. Mr. Gladstone's Cabinet of 1886 consisted of 14 members. In 1892 Lord Salisbury's Cabinet had grown to 17. Mr. Balfour's Cabinet in 1905 reached the number of 20, and the Cabinet of Sir Henry Campbell-Bannerman consisted of the same number. This seems to be about the normal number; in 1934 there were 21 members. The episode of the War Cabinet has been referred to above,<sup>3</sup> and the emergency Cabinet of 1931 had but 10 members. The work of deliberation cannot be facilitated or strengthened by this increase of numbers, and we may find that we are returning, in some respects, to the

<sup>1</sup> 16 & 17 Geo. V, c. 18.

<sup>2</sup> See Bulwer's *Life of Palmerston*, i. 91 as to the Chancellor of the Exchequer; *Hardwicke State Papers*, ii. 461 as to the First Lord of the Admiralty.

<sup>3</sup> See p. 149, *ante*.

practice of the 18th century—to an inner circle, the confidential Cabinet, and an outer group of persons to whom Cabinet office is given in order to please an individual, a constituency, or an interest.

### § 5. MINISTERS AND PARLIAMENT

The departments of government with which we have dealt are all in immediate contact with Parliament because their official chiefs, though holding office under the Crown, are excepted from the official disability imposed by the Act of 1707. So completely has opinion changed since the Act of Settlement forbade persons holding office under the Crown to sit in the House of Commons, that no one of these offices can be held for many weeks together without a seat in Parliament. This rule is based on custom created by convenience. For purposes of administration an officer of State could conduct the business of his department as well or better without a seat in Parliament. But the great departments of government are filled by the King from a group of statesmen indicated by the electorate, and their business must be conducted subject to the criticism of the representatives of the people. If a department is not represented in Parliament, criticism goes unheeded or the department is undefended. If comment upon bad administration is to be effective, if good administration is to be justified and supported by public opinion, it is essential that the great departments should be represented both in the House of Lords and also in the House of Commons. This matter will be better dealt with in the next section. Here it may be said that the most noted instance of a Cabinet minister remaining without a seat in Parliament for any length of time is that of Mr. Gladstone in 1846. On being appointed Colonial Secretary in December 1845 he vacated his seat for Newark, and, failing to obtain re-election, he was out of Parliament until he went out of office with Sir Robert Peel in June 1846. Sir Arthur Griffith-Boscawen sat in Bonar Law's Cabinet from October 1922 to March 1923 without a seat in the Commons. But Sir W. Jowitt had to resign the office of Attorney-General in 1931 when he was defeated at the general election, and efforts to find him a seat failed.

### § 6. NON-POLITICAL DEPARTMENTS

We should bear in mind that, when we have described the various departments of government as represented by their political chiefs, we have only drawn in outline the salient features of the executive. There are important departments which are not thus represented in Parliament, and every department, whether it does or does not possess a political chief, possesses a staff of permanent officials by whom the daily business of government is carried on.

The departments which may be described as non-political are, broadly speaking, the outlying departments of the Treasury, the Ecclesiastical Commission, and the Charity Commission.

But, since a department which has no authorized spokesman in either House is apt to fare badly under adverse criticism, it will be found that provision is made for some Parliamentary representation of each of these departments.

#### *Offices connected with the Treasury*

The members of the Treasury Board would naturally defend or explain, if required, the action of the offices which it controls,<sup>1</sup> and which have no political chiefs. Of these some discharge duties which are almost wholly ministerial. Such are the Inland Revenue and Customs and Excise Commissions. Others discharge duties which may bring them within range of criticism.

<sup>1</sup> The offices are:

The Exchequer and Audit Office.	Civil Service Commission.
Customs and Excise Establishment.	<i>London Gazette</i> Office.
Office of the King's and Lord Treasurer's Remembrancer, Edinburgh.	British Museum.
Inland Revenue Department.	National Gallery and National Portrait Gallery.
Meteorological Office.	Wallace Collection.
Mint.	Record Office.
Paymaster-General's Office.	Development Commissioners.
Treasury Solicitor's Office.	Stationery Office.
Parliamentary Counsel's Office.	Post Office.
	Office of Works.

The last two have their Parliamentary chiefs.

The Public Works Loan Board and the National Debt Office are not subordinate to the Treasury (*Heath, The Treasury*, p. 125). The Meteorological Office is under the administrative control of the Air Ministry.

*The Ecclesiastical Commission*

The Ecclesiastical Commission is not connected with any governmental department. We shall have to speak of it in a later chapter, so will only say here that in respect of the management and distribution of Church property it exercises large powers conferred upon it by various Statutes.<sup>1</sup> In the discharge of the duties thus laid upon the Commission it may very possibly become the subject of hostile criticism or inquiry, and this possibility is met, not by giving to the Commission a changing political chief, but by placing among its members the Bishops and certain great officers of State, and by the further introduction into its body of two paid Commissioners,<sup>2</sup> one of whom is eligible for a seat in the House of Commons, and may there defend its action.

*The Charity Commission*

The Charity Commission needs a longer notice. It dates from 1853; and its objects are to protect property held upon charitable trusts; to inquire into the administration of such property; to adapt the use of the charity from time to time to purposes corresponding to the intentions of the donor, where those purposes cannot profitably be carried out as originally expressed; and to cheapen and facilitate legal proceedings incidental to the use of charities.

A charity is for these purposes a grant of property in trust for the benefit of the public, or of some class of the public, not necessarily for the benefit of the poor. In process of time such a grant may come to be lost, wasted, or misapplied. The body of trustees may fail to be renewed, and funds which stood in their joint names may pass into the hands of the survivor, and thence, if the trust be not reconstituted, may become confused with his personal property. Careless administration of the property may lead to a diminution of its capital value, or an improvident distribution of its income. Lapse of time may alter the conditions of the grant so as to make its application useless or even harmful.

<sup>1</sup> 6 & 7 Will. IV, c. 77; 3 & 4 Vict. c. 113; 13 & 14 Vict. c. 94; 31 & 32 Vict. c. 114; 35 & 36 Vict. c. 14; 47 & 48 Vict. c. 65; 4 & 5 Geo. V, c. 5; Ecclesiastical Commissioners Measure, 1926, are among the more important of these.

<sup>2</sup> 13 & 14 Vict. c. 94, s. 3.

The legal position of charities before the appointment of the Charity Commission was this: the trustees could not deal with the capital or *corpus* of the property without the approval of the Court of Chancery, nor without such approval could they alter the distribution of the revenue. Thus, though trustees of charities enjoyed some special facilities in coming before the Court, they could not make an advantageous sale of property or a suitable change in the disposition of the income without entering upon legal proceedings which often involved expense and delay.

The better management of charities had been under the consideration of Parliament for a long time before the first Act on the subject was passed in 1853.<sup>1</sup> The object of this Act was to place in the hands of a public body many of the powers which before could only be exercised by the Court of Chancery. It empowered the Crown to appoint by sign manual warrant four Commissioners, three to hold office during good behaviour and one during pleasure. The last was to be unpaid, and a mode was thereby provided for representing the department in the House of Commons. To this body two Commissioners were added in 1874, when the work of the Endowed Schools Commission was transferred to the Charity Commission, and two more in 1883 under the City Parochial Charities Act. Under the Act of 1853 and successive Acts which have modified or extended the powers originally conferred, the Commissioners can inquire into the administration of charities and compel the production of their accounts.<sup>2</sup> In various ways they can cheapen and facil-

<sup>1</sup> A Parliamentary Commission sat from 1818 to 1837, and reported on all the charities in the country. A Select Committee of the House of Commons, appointed in 1835, examined and reported on this report: and a Royal Commission sat in 1849 to consider the completed reports of the Commission of 1818.

<sup>2</sup> The Acts relating to the Charity Commission are, as regards inquiry into administration of Charitable Trusts, 16 & 17 Vict. c. 137 (1853), 18 & 19 Vict. c. 124 (1855); as regards Schemes, 23 & 24 Vict. c. 136 (1860), 32 & 33 Vict. c. 110 (1869); as regards Endowed Schools, 32 & 33 Vict. c. 56 (1869), 36 & 37 Vict. c. 87 (1873); as regards the City Parochial Charities, 46 & 47 Vict. c. 36 (1883). The transfer to the Charity Commissioners of the powers of the Endowed Schools Commission was effected by 37 & 38 Vict. c. 87 (1874). War charities were placed under their control by 6 & 7 Geo. V, c. 43, and their powers under this Act were applied to charities for the blind by 10 & 11 Geo. V, c. 49.

tate the management of property held on charitable trusts. They can appoint new trustees by simple order, can advise them in matters of doubt, and can give them a statutory indemnity for acting on such advice. They can sanction and control sales, mortgages, and leases of lands. They can vest property in official trustees, thus not only securing the property, but simplifying the title to it. By these means charities are saved the delay and cost of proceedings in the Chancery Division.

Again, where it is desirable to alter the mode of administering a charity because of a change in the circumstances of the place which was to be benefited, or of the property constituting the endowment, or of the general conditions of society, the Charity Commission have received power, since 1860, to frame new schemes for effecting the intention of the founder of the charity. Appeal lies to the Chancery Division from such decisions.<sup>1</sup>

As has been already stated, the Board of Education Act, 1899, made provision for the transfer, by Order in Council, to the Board of Education of the powers of the Commission in respect of such trusts as the Charity Commissioners determined to be educational. In the case of such endowments appeal from the Board lies to the Privy Council.<sup>2</sup>

## VIII. THE CIVIL SERVICE AND THE TERMS OF OFFICIAL TENURE

### § 1. THE PERMANENT CIVIL SERVICE<sup>3</sup>

In one way or other every public office is provided, directly or indirectly, with a spokesman in Parliament, who has some special knowledge or official connexion with its business, though he may not be its political chief.

This is the more important, because no one but a servant

<sup>1</sup> *Campden Charities, In re* (1881), 18 Ch. D. 310.

<sup>2</sup> See *St. Leonard, Shoreditch, Parochial Schools, In re* (1885), 10 App. Cas. (P.C.) 304.

<sup>3</sup> This term has no legal definition; in practice it covers those Crown servants who are engaged in executive work in government departments, who are not members of the defence forces, and who are not political officers. How far it covers minor employees is not certain. See Mustoe, *British Civil Service*, pp. 15–27. For superannuation purposes it is strictly defined.

of the Crown, holding a political office, can speak on behalf of a government department.<sup>1</sup> If things go wrong it is for the King's advisers to suggest a change of measures to the civil servants in the department concerned, or failing this, a change of men to the Crown. The Cabinet can almost always in the last resort ask the King to exercise his power of dismissal, and treat a refusal as a mark of want of confidence in themselves.<sup>2</sup>

It is always possible to turn a non-political into a political department by removing the Parliamentary disability of its chief officer. Custom and convenience would then require that he should have a seat in Parliament, and direct responsibility to Parliament would at once give him the control over the policy of his office.

The Parliamentary chief for the time being personifies the department in the view of the public; but the business of the country is done by the permanent officials. They are severed from political life not merely by the Statutes which disable them from sitting in the House of Commons, but by the usage of the Civil Service, applicable to both Houses of Parliament, which secures 'that the members of the service remain free to serve the government of the day without necessarily exposing themselves to public charges of inconsistency or insincerity'.<sup>3</sup> The Parliamentary chief changes, but they are unaffected by the ebb and flow of political opinion. To this circumstance we owe several advantages.

Security of tenure and the reasonable prospect of promotion induce men of ability to enter the public service. They take an interest in their work which they would not feel if they knew that their official careers might be brought to an end by matters over which they have no control—an

<sup>1</sup> Todd (*Parl. Govt. in England*, i. 752) states that the votes in supply for the British Museum are an exception to this rule, being proposed by one of the trustees. This seems to have been the practice at least as late as 1866. The vote is now moved by the Financial Secretary to the Treasury.

<sup>2</sup> See *post*, p. 234, as to offices tenable 'during good behaviour'.

<sup>3</sup> Order in Council, 29 Nov. 1884, whereby a civil servant standing for a constituency must resign his post when he announces himself as a candidate. The rule is relaxed for members of the industrial staffs of the defence departments other than certain supervising officers; Order in Council, 25 July 1927. Peers must not speak or vote while in the service. All servants must avoid political activity; Treasury Minute, 27 Feb. 1928.

adverse division in the House of Commons, or the blunders of another department, leading to the retirement of the Ministry. Thus the country is well served, and presumably<sup>1</sup> on more economical terms than would be possible if the tenure of office were precarious.

And one may say further, that but for this rule of permanence the Civil Service would not merely fall short of its present standard of excellence: it would not attain to an ordinary standard of efficiency. If we picture to ourselves a new staff of officials on each change of Ministry beginning afresh to master the elaborate system of Treasury control or the multitudinous detail of the Home Office, we can form some idea of the difficulties which would befall us if the entire patronage of the Crown was placed at the disposal of an incoming Prime Minister. When we recollect that during two years—1885, 1886—four Ministries held office, that, in the case of two of these, one lasted for 227 days, and the other for 178, and that the Labour Ministry of 1924 lived only nine months, it is plain that a system which even in a modified form is said to lead to departmental inefficiency in America, where there is necessarily a four years' tenure of office, would lead, with us, to departmental collapse.

It remains to ask how is the administration affected by the frequent change of the Parliamentary chief. Bagehot has dwelt at length on the advantages of the system. Official work, however capable and zealous the public servant may be, is apt to get into grooves. The Parliamentary chief brings a fresh mind to bear on the routine of office, and may ensure a circulation of ideas in its intellectual life. Perhaps Bagehot's ideal is not always attained. He pictures the political leader bringing intelligent curiosity and quickening impulse to bear on the work of his department, while a permanent staff with a precise knowledge of the action of the official machinery is prepared to welcome with zeal his suggestions for making it move quicker, more smoothly, more cheaply.<sup>2</sup> This may not always be so. In most cases the minister finds himself

<sup>1</sup> That pension is deferred pay in any sense was not accepted by the House of Lords in *Considine v. McInerney*, [1916] 2 A.C. 162, at pp. 171, 172, 173, 181. In practice it is usually held that the value of pension rights is equivalent to the addition of about one-eighth of the salary.

<sup>2</sup> Bagehot, *English Constitution*, ch. vi: 'Change of Ministry'.

unable to resist the weight of official pressure, as in the case of Mr. J. H. Thomas's renunciation in office in 1924 of his earlier proposals for the reform of colonial government. On the other hand Lord Morley at the India Office was autocratic and doctrinaire, as his correspondence with Lord Minto abundantly shows.<sup>1</sup>

But whether or no the Parliamentary chief promotes the administrative capacity of his department he is certain to render it one great service. He stands between his staff and the House of Commons. It is possible that the permanent staff know too much to be tolerant of criticism; they may meet it with resentment and contempt: but assuredly it is certain that a popular assembly knows too little to be a fair judge. Its criticism may be perverse, its interest intermittent, its action capricious.<sup>2</sup>

It is the duty of the Parliamentary chief to aid his department by answering criticism which needs to be answered, by resisting expressions of censure, or legislative action, which is ill considered or unjust. He can speak with some experience of the ways of the House of Commons, and with some sympathy for its ignorance, for he has but lately learned the business of the department himself: if his powers of persuasion fail, he has the government majority at his back.

And not only in dealings with the House of Commons is the Parliamentary chief of use to his department. He is to the general public the interpreter of official life; he represents his office in the view of the country. An outstanding head like Joseph Chamberlain lends distinction to an office hitherto obscure. If he gets credit for its successes he also suffers for its shortcomings or failures.

It might be possible to have as good a public service if the departments were not represented in Parliament, but it is certain that we should not have so strong a public service, and that its place in popular esteem is raised, even at the cost of some want of appreciation of the merits of the permanent staff,<sup>3</sup> by its connexion with party politics.

<sup>1</sup> For the King's vain resistance to certain of Morley's reforms, see Lee, ii. 381-9.

<sup>2</sup> The views on India of many Liberals in the Parliament of 1906-10 illustrate this point.

<sup>3</sup> The rule under which officials are not supposed to be more than

It is well to bear in mind that the permanence of the Civil Service, though we regard it as following necessarily from the general disqualification of officials for a seat in the House of Commons, is really only a matter of convention. It is impossible to read Swift's diary or the letters of Bolingbroke without seeing that the American maxim—'the spoils to the victor'—was very present to the minds of the Tory party in the reign of Anne. Walpole and George Grenville deprived officers of their commissions for voting against the Government in Parliament. Henry Fox in 1763 dismissed opponents of the Government from non-political places on such a scale as to excite general disgust. Since then we have heard nothing of a proscription; but it would be perfectly legal, though wholly unconstitutional, for an incoming minister to obtain from the Crown as a proof of confidence the dismissal of every civil servant who holds his office during pleasure.

## § 2. CONDITIONS OF TENURE

This brings us to the nature of official tenure. On what terms do public servants hold their offices?

All offices, whether limited as to tenure by a specified time or not so limited, are held subject to one of two conditions: they are held either 'at pleasure', or 'during good behaviour', and unless it is otherwise stated their occupants hold 'at pleasure'. 'Persons employed in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of the office, are ordinarily engaged on the understanding that they hold their employments at the pleasure of the Crown.' Thus Lord Herschell in the case of *Dunn v. The Queen*,<sup>1</sup> and the rule is equally applicable to civil and to military appointments. Of the servants of the

exponents of ministerial policy is not now so rigidly observed as formerly, but it is salutary.

<sup>1</sup> [1896] 1 Q.B. (C.A.) 116, and see *Shenton v. Stuart*, [1895] A.C. 229. But statutory provision may be made for some restriction on the power of dismissal as in the New South Wales case of *Gould v. Stuart*, [1896] A.C. 575. See also *Reilly v. R.*, [1934] A.C. 176, which lays down that the relation of the officer to the Crown may have contractual character, though the Crown can in the absence of statutory restriction terminate office at pleasure.

State some hold directly of the Crown, and are appointed either,

- (1) By delivery of symbols of office, e.g. the seals of a Secretary of State;
- or (2) by Order or declaration of the King in Council, e.g. the President of a Board or a Civil Service Commissioner;
- or (3) by letters patent under the Great Seal, e.g. the Chancellor of the Duchy of Lancaster, Regius Professors of the Universities, or the Comptroller and Auditor-General;
- or (4) by warrant or commission under the Sign Manual, e.g. the Viceroy of India, the First Commissioner of Works, or an officer when first given permanent rank in the Army.

Some are not directly appointed by the Crown, but are appointed with more or less of form by heads of departments. An officer in the Navy, for instance, holds a commission from the Lords of the Admiralty, an Under Secretary of State is appointed without form by his political chief, the Parliamentary Secretary to the Board of Trade by a minute of his Board, the Receiver-General of Inland Revenue by Treasury warrant. Civil servants in general are certified to be qualified by the Civil Service Commission and are notified of the posts they are to fill by the department concerned.

But all hold on one or other condition, the royal pleasure or good behaviour, subject in either case in some instances to an age limit.

To this last a *third* is sometimes added which has given rise to misunderstanding. The Judges, the Comptroller and Auditor-General, hold office during good behaviour, '*but upon the address of both Houses of Parliament it may be lawful to remove them*'. This has been construed to mean that such officers can *only* be removed on address of the two Houses. But the words mean simply that if, in consequence of misbehaviour in respect of his office, or from any other cause, an officer of state holding on this tenure has forfeited the confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him. Such officers hold, as regards the Crown, *during good behaviour*; as regards Parliament, also during

good behaviour, though the two Houses may extend the term so as to cover any form of misconduct which would destroy public confidence in the holder of the office.<sup>1</sup> We may then dismiss this condition of tenure, as being part of the law relating to Parliament. Apart from this the question of dismissal is not wholly free from difficulty.

Appointments made during good behaviour create a life interest in the office, unless specifically made for a term of years, or subject to retirement at a specified age. Such as are made directly by the Crown are made by sign manual warrant or by letters patent. Good behaviour means good behaviour in respect of the office held. Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect to attend to them, or, it would seem, conviction for such an offence as would make the convicted person unfit to hold a public office.<sup>2</sup>

Where an office is thus forfeited by breach of the condition of tenure, the mode of removal does not seem perfectly clear.

The forfeiture of an office held by letters patent must, it is said,<sup>3</sup> be enforced by a writ of *scire facias*, which has been thus described:

'The writ of *scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded on a Record. These Crown grants and charters under the Great Seal are always sealed in the Petty Bag Office, which is on the Common Law side of the Court of Chancery, and become Records there.'<sup>4</sup>

The duties of the Petty Bag Office are now discharged in the Crown Office in Chancery,<sup>5</sup> but the writ of *scire facias* must none the less be founded on a Record, and thus would

<sup>1</sup> For the procedure in such cases, see *Parl. Deb.*, 2nd Ser. xiv. 500, 502, for a statement by the Speaker, in the case of Mr. Kenrick, as to the courses open to the House. Todd, *Parl. Govt. of England* (2nd ed.), ii. 867, gives a full account of the case of Sir Jonah Barrington: a case in which the King acted upon an address of the two Houses.

<sup>2</sup> 9 Co. Rep. 50; *R. v. Richardson*, 1 Burr. 539.

<sup>3</sup> 'Regularly there must be a *scire facias* to remove the party where he has the office by matter of record; for he cannot be removed without matter of record.' Com. Dig. Tit. Offices, k. 11.

<sup>4</sup> *R. v. Hughes* (1866), L.R. 1 P.C., p. 87.

<sup>5</sup> 37 & 38 Vict. c. 81. s. 5.

be inapplicable to the forfeiture of offices granted by sign manual warrant.

There appears to be authority<sup>1</sup> for saying that a sign manual warrant, making a grant of property, may be revoked simply: if so it would seem that a grant of office might on the occurrence of cause of forfeiture be revoked in like manner, unless other provision exists under Statute.<sup>2</sup> Probably the warrant would, on just cause, be revoked and the ejected officer left to proceed, if so minded, against the Lords of the Treasury for his salary in the form of a Petition of Right,<sup>3</sup> or by proceedings analogous to the former writ of *quo warrantum* against the person who had replaced him in his office.

### § 3. THE ORGANIZATION OF THE CIVIL SERVICE

The Revolution marked a definite change in the position of ministers eligible for seats in Parliament and officers not so eligible. At the same time the growth of ministerial responsibility made the appointments to office more and more definitely political; offices were given by ministers acting for the Crown without regard to age or qualification in return for political support or out of personal interest.<sup>4</sup> It was not until 1848 that the Treasury set on foot an inquiry, one of the members participating being Sir Charles Trevelyan, who collaborated with Sir Stafford Northcote. The Report of 1853<sup>5</sup> laid down the principles now in general operation. (1) When possible the mode of entry was to be by competitive examination conducted by a central board of examiners of independent status, due regard being had to the age, health, and general fitness of the examinees. (2) There should be

<sup>1</sup> Forsyth, *Cases in Constit. Law*, p. 385: but where a borough petitioned that a grant of a separate Quarter Sessions (made under 5 & 6 Will. IV, c. 76, s. 103) should be revoked, the Law Officers advised that this could not be done, partly because a Court of Justice established by Law could not be abrogated by a mere act of prerogative, partly also because the office of Recorder being *tenable during good behaviour* could not be thus taken away from the holder; *ibid.*, p. 386.

<sup>2</sup> Thus by Statute (21 & 22 Vict. c. 83, s. 12.) Regius Professors in the Scots Universities can be removed only by the consent of the Privy Council Committee for these Universities. Their appointment is by commission in the form of letters patent under the sign manual and the Seal of Scotland.

<sup>3</sup> It is not at all clear that a petition would lie, and no precedent exists.

<sup>4</sup> Moses, *The Civil Service of Great Britain*, p. 24.

<sup>5</sup> *Parl. Pap.*, 1854, xxvii.

different standards of examination for different classes of posts. (3) In the departments mechanical work should be separated from intellectual work. (4) Promotion should be by merit and increments of salary conditional on satisfactory work. These, of course, were the principles advocated by Macaulay and applied to the case of the Indian Civil Service under the Government of India Act, 1833.<sup>1</sup> At the first this revolutionary report was bitterly criticized, and only in 1855 was a Civil Service Commission set up to grant certificates to candidates for junior posts, who were to serve for six months on probation. But the Commission only examined candidates nominated by the department and competition took place only if several names were sent in. The Superannuation Act, 1859, strengthened the system by confirming as a rule eligibility for pension to persons duly certificated, and in 1860 nomination of at least three candidates for each vacancy was decided upon by the Government at the instance of a Select Committee of the House of Commons.

In 1870 an Order of 4 June traced the outlines of the present system. It provided the general rule of competitive examination, but authorized the Commissioners to depart from it in cases for which qualifications wholly or in part professional and not ordinarily to be acquired in the Civil Service were requisite,<sup>2</sup> and it outlined a distinction between Class I appointments for intellectual work and Class II for more or less mechanical employment, selection to be made by different tests. This tentative distinction was examined by subsequent Commissions of 1874 and 1886–90, and in part effect was given to it in practice. But the whole question was re-examined by Lord Macdonell's Royal Commission in 1912–14,<sup>3</sup> and a scheme proposed, only to be laid aside temporarily during the post-War period in favour of recruitment by selection of a competitive character but without examination, through the agency of Selection Boards. This system was rendered desirable by the interruption of studies under war conditions.

<sup>1</sup> For the history, see O'Malley, *The Indian Civil Service* (1931).

<sup>2</sup> Repeated in the Consolidated Order in Council, 10 Jan. 1910; General Regulations of Civil Service Commissioners, 6 April 1923.

<sup>3</sup> *Parl. Pap.*, Cd. 7338 (1914).

In 1919 the system of relations between employers and employed recommended in the Whitley Report<sup>1</sup> was applied to the Civil Service, and there was set up a National Whitley Council for the Administrative and Legal Departments. In 1920 a Committee of that body reported in favour of constituting six classes: (1) an Administrative Class, which corresponds with the former Class I clerkships; (2) an Executive Class; (3) a Clerical Class; (4) a Writing Assistant Class; (5) a Shorthand-Typist Class; (6) and a Typist Class. These classes were duly approved by the Government and are those generally in operation in large departments. But there are also (1) professional, scientific, and technical officers; (2) a number of departmental classes not yet assimilated to the classes as reorganized; (3) certain clerks ('P' and 'P.U.' classes) who are given permanent employment, but are not 'established'; (4) messengers; (5) temporary men and women clerks. Further there are large numbers of industrial workers (in April 1929, 122,000) as opposed to 312,000 civil servants of whom 79,022 were women.<sup>2</sup>

The Administrative Class is essentially charged with the duty of framing departmental policy, of suggesting developments to ministers and devising schemes for carrying out the policies which ministers favour, and of considering means of improving departmental organization. In fact, of course, much policy is ultimately due to civil servants' initiative, e.g. that of Sir Robert Morant at the Education Office. On the other hand, the junior members of the Foreign Office until 1906 are largely engaged in mechanical work, and the Permanent Under Secretary did not hold it his duty to suggest possible action to the Secretary of State save on express request.<sup>3</sup> Lord Salisbury remained largely aloof from his office.<sup>4</sup>

The control of this evolution has been for financial reasons in the hands of the Treasury; since 1920 under an Order in Council of 22 July it is empowered to control the conduct of the civil establishment and to regulate classification, remuneration and other conditions of service. It was also laid down

<sup>1</sup> *Parl. Pap.*, Cmd. 198 (1919).

<sup>2</sup> A Royal Commission (1929-31) under Lord Tomlin found it unnecessary to make any fundamental change; *Parl. Pap.*, Cmd. 3909.

<sup>3</sup> Tilley and Gaselee, *The Foreign Office*, pp. 124 f., 135.

<sup>4</sup> Lady G. Cecil, *Life of Lord Salisbury*, iv.21.

that the consent of the Prime Minister was necessary for the appointment of heads and deputy heads of departments, and the principal financial and establishment officers.<sup>1</sup> To enable the Treasury to carry out its functions Lord Haldane's Committee<sup>2</sup> on the Machinery of Government recommended, and there has been carried out, the erection of a Department of the Treasury, now controlled by an Under Secretary, charged with the duty of considering all staff questions.<sup>3</sup> Subject to the power of the Treasury, the head of each department can regulate its proceedings. The whole rests on the prerogative, the rights of the Crown as employer of state servants, for a governmental proposal in 1854 to legislate was not carried out.

#### § 4. APPOINTMENT, PROMOTION, AND CONDITIONS OF SERVICE

The Civil Service Commission's certificate is an essential preliminary to any employment in the Civil Service.<sup>4</sup> The Commissioners are appointed by Order in Council and hold office at pleasure,<sup>5</sup> but in practice, as usual, their tenure is during good behaviour. They may make regulations as to the conditions of admission of any classes of persons, but those regulations are subject to Treasury approval.<sup>6</sup>

The general rule of examination is scientifically applied to the reorganization classes above mentioned. The Administrative Class is recruited at age 22–4 by examination on the Honours standard of the Universities. The Executive Class is recruited at age 18–25 on the standard of a full secondary school course. The Clerical Class is recruited at age 16–17 for boys, 16½–17½ for girls, by an examination of the standard reached at the end of the intermediate stage of a secondary course. The Writing Assistant Class is recruited by local competitive examinations at age 16–17; Women Typists at age 18–28, Shorthand Typists by competitive examination

<sup>1</sup> *Parl. Pap.*, Cmd. 3909, p. 7.

<sup>2</sup> *Parl. Pap.*, Cd. 9230 (1918).

<sup>3</sup> Each department has an establishment officer to co-operate with the Under Secretary at the Treasury. He is Chairman of a Standing Committee of these officers representing the great departments.

<sup>4</sup> Order in Council, 22 July 1920, Art. 2; 22 Vict. c. 26, s. 17.

<sup>5</sup> Order in Council, 22 July 1920, Art. 1 (1) and (2).

<sup>6</sup> Order in Council, 22 July 1920, Art. 4.

among typists of at least one year's service, or if necessary by open competition. In all these cases there is possibility of promotion from classes below to those above, from Writing Assistants upwards. For posts with professional qualifications the mode of selection is by competitive interview by a selection board, on which are a representative of the Commission and the head of the branch in which the vacancy has occurred. Thus are recruited among others legal officers, forestry experts, engineers, chemists, inspectors of factories, and valuers.

Indian Civil Servants, so far as recruitment in England is concerned, are recruited by the same examination as the Administrative Class of the Civil Service. There is a similar examination, in which two modern languages must be taken, for the Foreign Office, the Diplomatic Service, and the Consular Service. But competition is restricted to candidates approved as suitable by a Board of Selection. This replaces the former requirement of an independent income for entrants into the diplomatic service. The now very large Colonial Services are recruited for the most part by the Colonial Office itself; competitive examinations are not employed. In the case of India and certain Colonial Services some training is given during a probationary period in Universities in the United Kingdom.

Aliens are ineligible, and appointees must normally be natural-born British subjects, children of persons who are or were at the time of death such subjects, but in certain cases exceptions are allowed.<sup>1</sup> In the case of services under the control of the Foreign Office birth in the United Kingdom or a Dominion in the case of appointee and parent is required.

Women are in general admitted on the same terms as men, but subject to regulations made by the Civil Service Commission;<sup>2</sup> they must be unmarried or widows, save in cases specially excepted by the Commission and the Treasury.<sup>3</sup> They are at present excluded from (1) posts in the Diplomatic and Consular services; (2) colonial or protectorate

<sup>1</sup> 9 & 10 Geo. V, c. 92, s. 6; Regulations, 17 Jan. 1930.

<sup>2</sup> 9 & 10 Geo. V, c. 71, s. 1; Order in Council, 22 July 1920; on the Act of 1922 see *Price v. Rhondda Urban District Council*, [1923] 2 Ch. 372, at p. 391.

<sup>3</sup> Regulations as to Admission of Women, 26 Aug. 1921, s. 1, modified slightly in 1934.

posts, which involves exclusion from the Colonial Office, whose members often hold such posts; (3) civil services in India recruited in the United Kingdom; and (4) the Commercial Diplomatic Service and the Trade Commissioner Service.<sup>1</sup>

All appointments are normally probationary, two years in the Administrative and Executive classes and professional posts, one year for the Clerical Class, and final appointment is conditional on satisfactory service.<sup>2</sup>

It must be added that in a small number of appointments, made direct by the Crown or scheduled to the Order in Council, 10 January 1910, no certificate is necessary from the Commission.<sup>3</sup>

The salaries of officers are provided by Parliament and regulated by the Treasury, but no legal action is open to a civil servant who does not receive his pay or what he claims as pay.<sup>4</sup> The same rule applies to increments. No salary can be assigned or taken in execution,<sup>5</sup> unless the office is a sinecure post.<sup>6</sup> But in case of bankruptcy, if the officer is allowed to retain office, the head of the department may consent to a portion of his pay being allocated by the Court to the trustee.<sup>7</sup>

Pensions<sup>8</sup> are normally due after ten years' service either on normal retirement at age 60, or on earlier retirement through permanent bodily or mental infirmity, or exceptionally on retirement for incapacity not amounting to misconduct justifying removal. The rate is now one-eightieth of the annual salary for each year of service, with a lump sum calculated at the rate of one-thirtieth of salary for each year served, not exceeding one and a half times that salary, which is based on the average salary of the last three years before retirement. There are elaborate provisions for reckoning in periods of service overseas under the Crown, e.g. as a Gover-

<sup>1</sup> Regulations reserving certain Posts to Men, 23 Aug. 1921.

<sup>2</sup> Order in Council, 18 Dec. 1918.

<sup>3</sup> Order in Council, 22 July 1920, Art. 2.

<sup>4</sup> *Kynaston v. Att. Gen.* (1933), 49 T.L.R. 300.

<sup>5</sup> *Flarty v. Odlum* (1790), 3 T.R. 681; *Apthorpe v. Apthorpe* (1887), 12 P.D. 192; *Mulvenna v. Admiralty*, [1926] S.C. 842.

<sup>6</sup> *Grenfell v. Windsor (Dean)* (1840), 2 Beav. 544, 550.

<sup>7</sup> *Ward, In re*, [1897] 1 Q.B. 266.

<sup>8</sup> Superannuation Acts, 1834 to 1935.

nor,<sup>1</sup> for abatement of pension on re-employment under the Crown, for commutation, &c. A pension is forfeited by conviction for treason or felony if the sentence exceeds twelve months or includes hard labour, unless a free pardon is accorded within two months of conviction.<sup>2</sup> There is no legal right to a pension, which is purely a matter of grace.<sup>3</sup> A pension, save as expressly provided by Statute as regards customs and inland revenue officers,<sup>4</sup> may be assigned, attached and taken in execution;<sup>5</sup> any pension may be in part awarded by a Court in bankruptcy to the trustee,<sup>6</sup> but without prejudice to the right of the chief officer of the department concerned to declare the pension forfeited.

The final decision as to emoluments rests with the Treasury and Parliament, which votes salaries annually. But the Whitley Council system affords civil servants a voice in determining their emoluments and conditions of service.<sup>7</sup> There is a National Council for the Administrative and Legal departments as a whole, Departmental Councils in the respective departments of the Service, with District or Local Committees in departments with scattered provincial staffs. The National Council is composed of fifty-four members, half the official side, half the staff side appointed by staff associations. The Chairman is the Second Secretary at the Treasury, the Vice-Chairman is a member of the staff side. The powers of the Council include consideration of the principles of promotion and discipline, but it may not deal with officers on scales of salary rising to £700 a year. The Departmental Councils have power to discuss the remuneration or grading of posts carrying salaries under £500 and those with higher salaries other than controlling or managerial posts, and may discuss issues of alleged breach of promotion

<sup>1</sup> 1 & 2 Geo. V, c. 24 (Governors); 19 & 20 Geo. V, c. 11 (diplomatic service).

<sup>2</sup> Forfeiture Act, 1870, s. 1.

<sup>3</sup> *Nixon v. Att. Gen.*, [1931] A.C. 184.

<sup>4</sup> 39 & 40 Vict. c. 36, s. 3; 45 & 46 Vict. c. 72, s. 3; 53 & 54 Vict. c. 21.

<sup>5</sup> *Huggins, In re* (1882), 21 Ch. D. 85; *Willcock v. Terrell* (1878), 3 Ex. D. 323; *Lucas v. Harris* (1886), 18 Q.B. D. 127. The cases show that a pension granted on condition of a right to recall is not assignable.

<sup>6</sup> Bankruptcy Act, 1914, s. 51; *Lupton, In re*, [1912] 1 K.B. 107. So under the Police Pensions Act, 1921; *Garrett, In re*, [1930] 2 Ch. 137.

<sup>7</sup> *Parl. Pap.*, Cmd. 198 (1918); *Introductory Memoranda* (Treasury), Royal Commission, 1930, p. 87 f.

principles or unfair disciplinary action. The National Council does not act as a Court of Appeal from a Departmental Council. The Council system is supplemented by direct negotiation between the Treasury and Representative Associations.<sup>1</sup>

From 1917 to 1922 claims by civil servants for higher rates of pay were dealt with by a Conciliation and Arbitration Board. In 1925 it was arranged to assign power in these cases to the Industrial Court. The Court is made up of the President with one member from panels selected (1) by the Minister of Labour representing the Chancellor of the Exchequer and (2) the staff side, but the members may not be civil servants or officials of associations. Its jurisdiction applies to salaries, hours of work, and leave, of classes of civil servants up to £700 a year, or in other cases may be exercised by consent of both sides.<sup>2</sup>

Promotion rests with the head of the department, but in large departments there are Promotion Boards, which, however, leave the responsibility to the head.<sup>3</sup>

Resignation is compulsory on marriage of women, when a gratuity of one month's pay may be granted for each year's service if at least six years' service has taken place. On widowhood, or insanity of or separation from the husband reinstatement is possible. If a man resigns before age 60 he loses all claim to pension; he must retire except on special Treasury arrangement, at age 65. Suspension may be ordered by the head of a department and salary may be suspended, and as we have noted dismissal rests with the head of the department, as the Crown has an absolute right to dispense with the services of any of its servants.

## § 5. THE LEGAL RIGHTS OF CIVIL SERVANTS

Reference has already been made<sup>4</sup> to the restrictions of political activity on the part of civil servants. Officers are forbidden to accept any outside occupation conflicting with the hours of attendance<sup>5</sup> or the interests of the department.<sup>6</sup>

<sup>1</sup> *Introductory Memoranda*, 1930, p. 100.

<sup>2</sup> Rules of Procedure of the Industrial Court for Civil Service Arbitrations, 28 Nov. 1928.      <sup>3</sup> Promotion Report, 1921.      <sup>4</sup> See p. 230, *ante*.

<sup>5</sup> Order in Council, 10 Jan. 1910, Art. 17.

<sup>6</sup> Treasury Circular, 11 Aug. 1927 (Cmd. 3307).

Special conditions apply to use of official information for publications,<sup>1</sup> and to inventions discovered by civil servants. There are rules forbidding civil servants being directors of companies holding government contracts or the award of contracts to such companies.<sup>2</sup> Sales to and purchases from civil servants normally require Treasury sanction. No civil servant must put himself in a position where duty and interest conflict; a Foreign Office official must not gamble on currency fluctuations.<sup>3</sup> A bankrupt may be compelled to resign.

As the result of the general strike of 1926 no established civil servant may be a member of any organization, the primary object of which is to influence the remuneration and conditions of employment of its members, unless the association is an approved association. Such an association can be certified only if (1) its membership is confined to Crown employees; (2) it must not be affiliated to any organization which does not comply with condition (1) or any federation including any such organization; (3) its objects must not include political objects; and (4) it must not be associated directly or indirectly with any political party or organization. Applications for certificates must be sent to the Chief Registrar of Friendly Societies and approved by the Treasury which issues a certificate.<sup>4</sup>

A civil servant has certain special privileges. He enjoys the protection of the Public Authorities Protection Act, 1893;<sup>5</sup> he may in certain limited cases plead Act of State;<sup>6</sup> officers of the Post Office, Customs, and Inland Revenue are exempt from jury or inquest service; from service as Mayors or Sheriffs or in other public office, or formerly in the militia.<sup>7</sup> A civil servant is not exempt from giving evidence, but the Crown can in certain cases claim privilege for official documents. He enjoys a certain immunity in respect of slander or libel in official reports to his superiors.<sup>8</sup> He is not liable in

<sup>1</sup> Treasury Minute, 19 Nov. 1891.

<sup>2</sup> Treasury Circular, 27 May 1924 (Cmd. 3307).

<sup>3</sup> Report of Board of Inquiry, 1928, s. 56.

<sup>4</sup> Trade Union and Trade Disputes Act, 1927, s. 5; S.R. & O., 1927, No. 800. <sup>5</sup> See pt. ii, p. 339, *post*. <sup>6</sup> See p. 318, *post*.

<sup>7</sup> See 39 & 40 Vict. c. 36, s. 9; 53 & 54 Vict. c. 21, s. 8; 8 & 9 Geo. V, c. 40, ss. 231, 232; *Van Druten, Ex parte* (1914), 30 T.L.R. 198.

<sup>8</sup> See pt. ii, p. 339, *post*.

contract in respect of any contract made for the Crown, though he must plead if such a case is, however improperly, brought against him.<sup>1</sup> But he is liable in tort for his own acts, though not those of subordinates not authorized expressly by him or caused by his failure in duty.<sup>2</sup>

In most cases the civil servant is not subject to legal process to compel performance of his duties, unless there is imposed on him a specific non-discretionary duty to the public as opposed to the Crown.<sup>3</sup> An action for money had and received will not lie<sup>4</sup> against a civil servant if in receiving the money he acted within his authority, but it will lie when the money is taken without authority to do so.<sup>5</sup>

A civil servant is subject to special penalties if he steals any property of the Crown,<sup>6</sup> and may at common law be severely punished for extortion,<sup>7</sup> or for oppression,<sup>8</sup> but good faith and belief in his right to act are an excuse.<sup>9</sup> An officer who commits a breach of trust, fraud, or imposition in a matter affecting the public, is guilty of a misdemeanour even if such action by a private person would not be criminal.<sup>10</sup> Sale of offices is criminal,<sup>11</sup> and neglect of common law or statutory duty may be a misdemeanour.<sup>12</sup> The use in any form of information in a way prejudicial to the interests of the State is penalized very elaborately under the Official Secrets Act, 1911 and 1920,<sup>13</sup> under which it is criminal to communicate official information to any person to whom he is not authorized to communicate it, to keep official documents, to imitate seals, dies, &c. The Attorney-General's consent is necessary

<sup>1</sup> See *Macbeath v. Haldimand* (1786), 1 T.R. 172; *Felkin v. Herbert* (1861), 30 L.J. Ch. 604.

<sup>2</sup> See pt. ii, p. 336, *post*.

<sup>3</sup> See pt. ii, p. 349, *post*.

<sup>4</sup> *Whitbread v. Brooksbank* (1774), 1 Cowp. 66.

<sup>5</sup> *Irving v. Wilson* (1791), 4 T.R. 485.

<sup>6</sup> 6 & 7 Geo. V, c. 50, s. 17 (2); 15 & 16 Geo. V, c. 86, s. 24, Sch. II.

<sup>7</sup> *R. v. Loggen* (1718), 1 Stra. 74; *Lee v. Dangar, Grant & Co.*, [1892]

2 Q.B. 337.

<sup>8</sup> *R. v. Williams* (1762), 3 Burr. 1317.

<sup>9</sup> *R. v. Young* (1758), 1 Burr. 557.

<sup>10</sup> *R. v. Baxter* (1851), 5 Cox C.C. 302.

<sup>11</sup> 49 Geo. III, c. 126, ss. 4, 5.

<sup>12</sup> *R. v. Pinney* (1832), 3 St. Tr. (N.S.) 11, 510; *R. v. Eyre* (1868), Finlason's Rep. 55, 58.

<sup>13</sup> *R. v. Simington*, [1921] 1 K.B. 451; *R. v. Crisp and Homewood* (1919), 83 J.P. 121. Mr. E. Lansbury in March 1934 was fined for including in a memoir of his father portions of two secret Cabinet documents, though his action was inadvertent.

for any prosecution. Acceptance of bribes is criminal by Common Law and under the Public Bodies Corrupt Practices Act, 1889, the Prevention of Corruption Acts, 1906 and 1916,<sup>1</sup> and the Honours (Prevention of Abuses) Act, 1925. It is criminal for an officer whose duty demands impartiality to conspire with others that he shall receive a bribe.<sup>2</sup> Postal officers are subject to a special series of penalties for failure of duty as regards the transmission of mails,<sup>3</sup> including the revelation of the contents of a telegram.<sup>4</sup>

On the other hand, an officer enjoys the benefit of the rule that the Crown represented by its servants is not bound by Acts not in terms applying to it.<sup>5</sup>

<sup>1</sup> *R. v. Evans* (1923), 17 Cr. App. R. 121. The onus of proving a payment not corrupt rests on the accused.

<sup>2</sup> *R. v. Whitaker*, [1914] 3 K.B. 1283.

<sup>3</sup> Post Office Act, 1908, ss. 55–8, 69, 89.

<sup>4</sup> Telegraph Act, 1868, s. 20.

<sup>5</sup> *Cooper v. Hawkins*, [1904] 2 K.B. 164 (speed of locomotive driven by soldier); *Chare v. Hart* (1919), 88 L.J. K.B. 833 (locomotive drawing too many unloaded wagons). But see pt. ii, p. 337, *post*.

## CHAPTER IV

### THE LEGISLATIVE POWER OF THE EXECUTIVE

#### I. PREROGATIVE POWERS

THE Crown possesses only a remnant of its former wide legislative authority apart from Parliament. The essential element retained is the right of the Crown to legislate for oversea territories, and this authority is of a special kind, to be discussed<sup>1</sup> in connexion with the relation of the Crown to oversea territories. It can hardly be said that the Crown has any legislative power properly so called as to the regulation of the Civil Service.<sup>2</sup> It can, and does, regulate many matters as to that service by Order in Council, but this is no more than the exercise of the right of an employer government to determine all the conditions affecting its workers. No crime is created by such orders, nor punishment of true penal character prescribed. The power to make regulations for the military and navy forces was a true legislative power,<sup>3</sup> but is obsolete apart from Statute. On the other hand the Crown can still prescribe prize regulations and regulate as during the War of 1914–18 such issues as contraband of war or days of grace, but subject to the rule that the Crown cannot by Order in Council derogate from rules of international law,<sup>4</sup> though the Crown in Parliament is not so restricted in action.<sup>5</sup> The Crown may also regulate in War trading with the enemy, but in the War of 1914–18 it was found advisable to resort to legislation<sup>6</sup> to extend the powers of the executive.

#### II. STATUTORY POWERS

##### § 1. THE SEPARATION OF POWERS

Though prerogative legislation was destroyed by the decisions of the seventeenth century, the executive was not left wholly without legislative authority. Power indeed was divided between Crown, Parliament, and the Courts, but the

<sup>1</sup> See pt. ii, p. 63, *post*.

<sup>2</sup> See p. 239, *ante*.

<sup>3</sup> See ch. x, *post*.

<sup>4</sup> See *The Zamora*, [1916] 2 A.C. 77.

<sup>5</sup> See *The Bathori*, [1934] A.C. 91, 98.

<sup>6</sup> 4 & 5 Geo. V, c. 87; 5 & 6 Geo. V, c. 98.

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division was far from absolute, though an observer normally acute, such as Montesquieu, was led to elevate the division into a separation calculated to secure the liberty of the people.<sup>1</sup> Thus the Crown in the eighteenth century still had power of initiation of legislation and could easily affect the details of Bills pending in either House, while the House of Lords had wide judicial authority and the Courts, in the form of judicial control, exercised much power over those subordinate institutions which often in judicial form (Quarter and Petty Sessions) carried on much of the local government of the country. It was quite natural, therefore, that the Crown should be entrusted by Parliament with powers of legislation. The Courts themselves claimed the right to make rules of procedure, which inevitably created new rights, and the local courts acquired without express Parliamentary authority both executive and legislative powers.<sup>2</sup>

But no doubt memory of prerogative claims caused grants of authority originally to be restricted where the executive was concerned. It was felt necessary to concede judicial powers to the Commissioners of Customs and Excise,<sup>3</sup> and to allow the King under the Mutiny Act of 1717 and later to make Articles of War to be enforced by Courts Martial. But this power was jealously scrutinized and the power to punish regulated by Act of 1749.<sup>4</sup> This contrasts in an interesting way with the wide grants found in the Tudor régime, when the Commissioners of Sewers were authorized to legislate, to rate landowners, and to enforce their orders by distress and the imposition of penalties.<sup>5</sup> The King was given<sup>6</sup> a wide though subordinate power to make law. For Wales he was empowered to legislate freely,<sup>7</sup> no doubt in order to facilitate the introduction of English law. It is significant that these wide grants mark a period of much social and economic change and governmental activity, and that a revival of

<sup>1</sup> *De l'esprit des lois*, Bk. XI, ch. vi.

<sup>2</sup> S. and B. Webb, *Local Government*, i. 480-3.

<sup>3</sup> 12 Car. II, c. 24, s. 45; 1 Geo. II, st. 2, c. 16, ss. 4 and 5. Cf. for the Commissioners of Stamps 25 Geo. III, c. 51, ss. 5 and 51.

<sup>4</sup> 22 Geo. II, c. 5, s. 57. See now Army Act, s. 69; Air Force Act, s. 69.

<sup>5</sup> 23 Hen. VIII, c. 5.

<sup>6</sup> 31 Hen. VIII, c. 8, repealed in 1547; 1 Ed. VI, c. 12, s. 4. The power did not apply to alter the Common Law, Statute Law, or equity.

<sup>7</sup> 34 & 35 Hen. VIII, c. 26, s. 119, taken away by 21 Jac. I, c. 10, s. 4.

analogous width of delegation marks the growing collectivism of the nineteenth century.

It is in fact clearly impossible for Parliament itself to deal with the issues confronting it at all adequately without delegation. It has no time to examine in detail the technical issues which present themselves, whether in the sphere of patents, copyright, trade marks, industrial property, gas, water regulation, transport, posts, telegraphs, telephones, wireless, telegraphy, health, housing, agriculture, industry, manufactures, merchant shipping, or local government. Still less has it the necessary experience and knowledge to deal with these issues, which are for experts to determine. Moreover, it is essential in these spheres to have elasticity and power of change ; it has been necessary repeatedly, as in 1924, 1930, and 1933, to resort to Parliament to lay down principles of subsidized house building, but the detailed regulations have essentially been left to the Ministry of Health. So also Public Assistance is a subject which has necessarily to be left to expert handling, and air navigation is in like case. Regulations on all these topics must be tentative, easily altered as occasion arises. It cannot be right that additions to the list of dangerous drugs should be impossible without resort to Parliament ; it was unfortunate that the Ministry of Transport has no general power to enact regulations experimentally to curb the reckless slaughter caused by motor traffic, so that a new Act became necessary in 1934. Moreover, executive discretionary powers are of value where technical matters are regulated by international accords, as in the case of copyright and air navigation or labour legislation. Further, in many cases a discretion must exist as to the times when and the places where a measure should be made operative ; outbreaks of epidemic diseases among men necessitate precautionary measures whose kind and scope cannot be foreseen ; similar outbreaks among animals are so grave that the Ministry of Agriculture must be accorded powers of very great ambit. The inevitability of delegation is proved by experience in the United States, where despite the rigidity of the constitution the validity of delegated legislation is fully established. There also the need is characteristic of the rise of collectivist ideals. Finally emergencies will arise, and it

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is best to create powers which can be used on occasion rather than merely to legislate *ex post facto*.

## § 2. FORMS AND TYPES OF DELEGATED LEGISLATION

All delegated legislation is characterized by its derivation from Parliamentary authority, and by its subjection therefore to scrutiny by the Courts to determine its validity. However wide the delegation, even if the legislation passed under it is to have effect as if enacted in the Act delegating power, the Court must examine its conformity with the authority given, whereas an Act is exempt from question.<sup>1</sup>

It is not wholly easy to determine the qualities which distinguish legislative and administrative measures, and nomenclature gives no aid. But many types of action may be ruled non-legislative; such are (1) the right of the Minister of Health under the Public Health Act, 1875, to order the making of a particular sewer; (2) the right of the Home Secretary to license vivisection on specified conditions;<sup>2</sup> (3) the power of the Minister of Transport to inquire into railway accidents or of the Secretary of State for Air to inquire into air disasters; (4) the right of inspection of factories and workshops and of coal mines; or (5) the statutory power of the Crown to remit penalties under the Sunday Observance Act, 1780.<sup>3</sup> It is true that Parliament in earlier days freely dealt in legislative form with administrative issues, e.g. enclosure Acts, and that it even now appoints Statutory Commissions on occasion, but legislation proper includes rather the laying down of principles to govern action and of rules of procedure, and on both these topics delegation is now a normal feature of every important and many minor Acts. The annual output of legislation falls in bulk far short of that of delegated legislation, though the return of peace conditions has reduced the disparity which marked the years when the brief Defence of the Realm (Consolidation) Act, 1914, was responsible for a stout volume of regulations of all kinds.

The forms in which the power is exercised are many and various. (1) The most formal type is the Order in Council under

<sup>1</sup> *Minister of Health v. R.; Yaffé, Ex parte*, [1931] A.C. 494.

<sup>2</sup> 39 & 40 Vict. c. 77, s. 8.

<sup>3</sup> Cf. *Orpen v. New Empire* (1931), 48 T.L.R. 8; 38 & 39 Vict. c. 80, s. 1.

Statute, which is adopted for the more elaborate serious forms of regulation; thus we have the Aliens Order in Council and the Air Navigation Orders. These, of course, are prepared by the Home Office and the Air Ministry, on whose responsibility they are formally enacted by the King in Council. (2) Departmental regulations take various names and forms. They are *regulations* such as those made under the Defence of the Realm Act or under the Factory and Workshop Act, 1901; *rules* such as Rules of Court or rules under the Poor Law Act, 1930, which authorizes the making of regulations, rules or orders; *warrants* such as those made by the Post Office<sup>1</sup> and issued as Treasury warrants, or by the King under the Regimental Debts Act, 1893; *orders*, such as the Public Assistance Order, 1930, or those of the Minister of Health under the Water Supplies (Exceptional Shortage Orders) Act, 1934; *minutes*, such as those of the Scottish Education Department, providing for the terms of education grants; *schemes* such as those of the Board of Education as to the superannuation of teachers; *by-laws*, made by railway companies with the approval of the Minister of Transport, or by District Councils with that of the Minister of Health. Again a minister in effect legislates when he is empowered to fix charges, to prescribe conditions, or to approve housing or clearance schemes with or without amendments. The term 'special order' is sometimes used, but has no fixed technical use; sometimes it denotes an ordinary regulation, sometimes an order<sup>2</sup> which, made by a subordinate authority (e.g. the Electricity Commissioners) and confirmed by a higher power (e.g. the Board of Trade), replaces the older procedure of an order confirmed by Parliament under the Provisional Order procedure, or in the Standing Orders of the House of Lords a regulation which requires an affirmative resolution of the House to take effect.

The normal type of such legislation is well illustrated by the powers given to the Minister of Transport under the Road Traffic Acts, 1930 and 1934, to limit speeds and even the

<sup>1</sup> Post Office Acts, 1908–20; Imperial and Foreign Post Warrant, 1930.

<sup>2</sup> Electricity (Supply) Act, 1919, s. 26. Such an Order could not be revoked under that Act by another special Order: *R. v. Minister of Transport; Leicestershire, &c. Co., Ex parte* (1928), 139 L.T. 600.

use of motors in specified areas on the application of a local authority. The power is characterized positively by its definite character, which renders it clear to Parliament, public and executive, and facilitates enforcement by the Courts. Negatively, it is marked by the fact that (1) it confers no power to legislate on principles or to tax, and (2) it does not authorize amendment of the Act creating it, or any other Act. It is clear that such delegation is as innocuous as possible, but much recent delegation derogates from these principles, and confers powers so wide that it is hard to see what limits were intended to operate, while in other cases any limit is open to evasion as the Courts are forbidden to control the enactments made.

### § 3. EXCEPTIONAL CASES OF DELEGATION

(1) In a number of instances power to legislate on principle has been granted even from early times. Since 1834 the central government has had wide authority to make rules for the management of the poor, and the Minister of Health is given this power by the Poor Law Act, 1930.<sup>1</sup> Power to impose taxation was accorded by the Safeguarding of Industries Act, 1921, and, though that measure has been repealed, the Board of Trade has been continued in authority,<sup>2</sup> for the purpose *inter alia* of retaliatory action, such as that intimated<sup>3</sup> against France in January 1934 and exercised against the Irish Free State in 1932–4. Temporary powers of the widest character were given by the Gold Standard (Amendment) Act, 1931, the National Economy Act, 1931, the Foodstuffs (Prevention of Exploitation) Act, 1931, the Abnormal Importations (Customs Duties) Act, 1931, and the Horticultural Products (Emergency Customs Duties) Act of that year. Far more important are the wide powers accorded by the Import Duties Act, 1932.<sup>4</sup> The Treasury is allowed to exempt goods from the normal 10 per cent. duty, after receiving a recommendation from the Import Duties Advisory Committee and consultation with the appropriate department, and to impose fresh duties on the Committee's recom-

<sup>1</sup> 20 & 21 Geo. V, c. 17, s. 1.

<sup>2</sup> 20 & 21 Geo. V, c. 28.

<sup>3</sup> Mr. Runciman, House of Commons, 29 Jan. 1934. The Order was duly made on 9 Feb.

<sup>4</sup> See 22 & 23 Geo. V, c. 30.

mendation. Preferences and exemptions may be given by order of the Treasury on the recommendation of the Secretary of State in the case of Dominion and Indian products and manufactures. In the case of foreign countries the Treasury may take like action on the motion of the Board of Trade, which with Treasury concurrence may impose extra duties against countries which discriminate against British goods.<sup>1</sup>

Further the agricultural reorganization of the United Kingdom has resulted in the grant of wide powers of control of wheat, of pig production, of milk production, of hops, potatoes, &c. The bodies in these cases have very wide authority to secure orderly marketing, to discourage over-production, to raise levies from growers and others so as to equalize the sums received by producers, and to impose penalties for violation of restrictions.<sup>2</sup> To render this system effective the Board of Trade was empowered in 1933 to limit foreign imports.<sup>3</sup>

(2) In certain cases powers have been given to the minister concerned in the execution of a new Act to modify its provisions so far as may be necessary to bring it into operation. These powers were only temporary, to meet minor inconveniences, in seven cases; the Local Government Act, 1894,<sup>4</sup> had a permanent power, but it applied only to first parish meetings or election of parish councillors, and thus was of minimal importance; the County Council now acts.

Power to amend other Acts is illustrated by the Juries Act, 1922, to be exercised by Order in Council; the Mental Treatment Act, 1930, to be exercised by ministerial order; and the Local Government (Scotland) Act, 1929, which allowed the Secretary of State to make very wide changes. Certain powers have also been given to local authorities as regards housing in town planning schemes.<sup>5</sup>

(3) In other instances a very wide power to carry out an

<sup>1</sup> Russian goods were temporarily limited by prohibition under 23 & 24 Geo. V, c. 10.

<sup>2</sup> See Agricultural Marketing Acts, 1931 and 1933. On the Hops Marketing Scheme, 1932, see *R. v. Minister of Agriculture and Fisheries; Berry, Ex parte* (1932), 101 L.J.K.B. 561; it was amended by Special Order in July 1934. Cf. also the Wheat Act, 1932.

<sup>3</sup> Agricultural Marketing Act, 1933.

<sup>4</sup> 56 & 57 Vict. c. 73, s. 80. See 23 & 24 Geo. V, c. 51, s. 55.

<sup>5</sup> 9 Ed. VII, c. 44; 9 & 10 Geo. V, c. 35; 22 & 23 Geo. V, c. 48, s. 11.

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Act by regulations is accorded. The Patents, Designs, and Trade Marks Acts, 1883 and 1888, authorized the Board of Trade to make rules for the registration of patent agents, and it was ruled by the House of Lords that the power left the whole scheme to the discretion of the Board, and that no Court of Law could canvas the merits of the scheme embodied in the rules of 1889.<sup>1</sup> It was held by Herschell L.C. that judicial control of the scheme would not have been an improvement on the plan followed. But it may be noted that, though that decision is binding and was approved in *Yaffé's Case*,<sup>2</sup> it is essentially the case that the power is to be carefully limited to the subject-matter granted. Thus, though the Minister of Transport is allowed to hear appeals from the decisions of Traffic Commissioners and to make such orders as he thinks fit on such appeals, it has been ruled that this does not give any authority to legislate generally but merely to make an order legitimately consonant with deciding an appeal.<sup>3</sup> It is dubious if the decision is in accord with the intention of the legislature, but its value as a check on unwise extension of power is important. Similar issues must arise on the claims asserted by such bodies as the Scottish Milk Marketing Board.

(4) The case of delegation which has excited most criticism is the class of instances where an Order 'shall have effect as if enacted in this Act'. The importance of this clause has been greatly reduced by the ruling in *Yaffé's Case* that it does not compel the Courts to accept such legislation unless it conforms to the Act. But in other cases<sup>4</sup> the power is given to a minister to confirm an order, 'and the confirmation shall be conclusive evidence that the requirements of this Act have been complied with and that the Order has been duly made and is within the powers of this Act'. The effect of the clause has not yet been judicially determined; it is clearly objectionable. On the other hand, it is impossible to take serious exception to the power given to add to lists of subject-matters, e.g. that in the schedule to the Poisons and Pharmacy Act, 1908, or the Trade Boards Acts, 1909 and 1918, or even

<sup>1</sup> *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347.

<sup>2</sup> *Minister of Health v. R.; Yaffé, Ex parte*, [1931] A.C. 494.

<sup>3</sup> *R. v. Minister of Transport; Upminster Services Ltd., Ex parte*, [1934]

1 K.B. 277.

<sup>4</sup> See Small Holdings and Allotments Act, 1908.

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to alter schedules, e.g. of the Companies Act, 1929, for the authority in such cases is closely defined.

#### § 4. SAFEGUARDS PROVIDED BY PARLIAMENT

In various cases Parliament provides for a measure of control. The chief method is the requirement made in the delegating Acts that measures shall be laid before both Houses. But the extent of the control is often nominal. This is the case when (1) mere laying is required as in the case of regulations under the Foreign Marriage Act, 1892, or (2) laying is required with the power of either House to require annulment or modification by resolution passed with a number of days, often twenty-eight or twenty-one sitting days.<sup>1</sup> There is under the rules of procedure of the Lords opportunity for debate and annulment, but the rules of the Commons afford small opportunity for effective action, though in class (2) a member can move a motion to annul after 11 p.m. and divide the House, as such business is exempted from the ordinary rule that no division is allowed after 11 p.m.

More effective is (1) laying with requirement that the regulation shall not operate until approved by resolutions, or that it will cease to operate after a specified period unless so approved.<sup>2</sup> The resolution in purely financial matters may be that of the House of Commons alone, as in the case of the Import Duties Act, 1932, when affirmative action is necessary for the continued operation of duties imposed by the Treasury or Board of Trade, twenty-eight days being allowed; while other orders can be annulled by resolution. Another useful rule is (2) the laying in draft for a number of days as in the case of Orders in Council under the Ministry of Health Act, 1919; but of far greater value is (3) the laying in draft with the provision that the draft shall not operate until approved by resolution.<sup>3</sup> There is clearly no rational principle affecting the treatment of different cases, and governments have shown great reluctance to accord effective control.

Antecedent publicity is also secured in cases where rules,

<sup>1</sup> See Housing, &c., Act, 1919, s. 7 (3); Nurses Registration Act, 1919, s. 3 (4); Local Government Act, 1933, s. 299.

<sup>2</sup> Mental Treatment Act, 1930, s. 15 (2); Import Duties Act, 1932, s. 19; Road Traffic Act, 1934, s. 1 (3).

<sup>3</sup> Census Act, 1920, s. 1 (2) and Sch.

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regulations, and by-laws fall under the Rules Publication Act, 1893. But the Act does not apply to any rules which are to be laid before operation, or rules made by the Minister of Health as successor to the Local Government Board, the Board of Trade, the Revenue Departments, or by or for the purposes of the Post Office, or by the Minister of Agriculture and Fisheries under the Contagious Diseases (Animals) Act, 1878. Where the Act applies, there must be forty days' notice at least and the draft is published and put on sale. The Act has no general application to Scotland nor to any rules which are not required by Act to be laid before Parliament, and Rules of Court are exempt from the procedure.<sup>1</sup> Moreover, the Act of 1893 does not apply to provisional regulations made in urgency or for special reasons, and such provisional regulations have on occasion been allowed to remain operative for years, though a Treasury Circular of 1921 censured the practice. In other cases special provision for publicity is made,<sup>2</sup> and most regulations are in fact printed *ex post facto* in the annual collection of Statutory Rules and Orders, in so far as they approach in character to the nature of public general Acts.

In certain cases special precautions for advice and publicity are arranged. Thus the Board of Trade<sup>3</sup> appoints committees to advise it on proposed changes under the Merchant Shipping Acts; the Home Secretary provides for publication, consideration of objections, and public inquiry in connexion with the making of regulations under the Factory and Workshop Act, 1901; the Minister of Labour acts similarly in respect of trade boards under the Act of 1918; the Minister of Transport has like duties in confirming special orders made by the Electricity Commissioners under the Electricity (Supply) Act, 1919; the Minister of Agriculture consults those interested under the Seeds Act, 1920; the Minister of Labour representative associations before making mining regulations, and so on. In general, modern practice is in favour of wide consultation of all relevant interests, e.g. trade unions and employers' associations, in preparing legislation. Under the Unemployment Act, 1934, assessment of need as affecting rates of relief

<sup>1</sup> 15 & 16 Geo. V, c. 49, s. 99 (5).

<sup>2</sup> e.g. Mining Industry Act, 1926, s. 18.

<sup>3</sup> 6 Ed. VII, c. 48, s. 79.

is determined by the Minister of Labour on the advice of an Unemployment Assistance Board; local advisory committees may give advice, and the draft regulations require Parliamentary sanction. Other rules are made by the Board, subject to confirmation by the Minister, and may be annulled by resolution of either House of Parliament.

### § 5. CRITICISM OF DELEGATED LEGISLATION

It has above been pointed out that pressure on Parliamentary time, technicality, the need to meet unforeseen contingencies, the requirement of flexibility, the desire to experiment, and the necessity to provide emergency powers<sup>1</sup> compel delegation.<sup>2</sup> But there are many criticisms: (1) Acts are asserted to be passed in too skeleton a form and to open the way to the usurpation by the executive of the powers of Parliament. (2) The facilities afforded to Parliament to scrutinize and control the exercise of powers delegated to ministers are inadequate. (3) Delegated powers may be so wide as to deprive the citizen of protection by the Courts. (4) The powers may be loosely defined, and the uncertainty is unfair. (5) There is in certain cases a difficulty of ensuring full publicity. (6) The privileged position of the Crown affords difficulty in securing redress.

In fact it is true that regulations are often not as well drafted as Acts, as they are normally not dealt with by the Parliamentary Counsel but only departmentally, and in part by non-legal experts, and, as in the case of Acts,<sup>3</sup> on occasion the interpretation runs counter to the intention of the draftsmen.

Moreover, there are grave objections to the giving a minister power to alter the Act which delegates power or other Acts.<sup>4</sup> It is true that the National Insurance Act, 1911, could

<sup>1</sup> See Emergency Powers Act, 1920. Parliamentary control is very complete.

<sup>2</sup> Very wide powers of interference with existing rights are given in the Water Supplies (Exceptional Shortage Orders) Act, 1934, passed hastily in April to meet the emergent risks of a serious deficiency in English supplies, which necessitated disregard of ordinary principles of respect for private rights.

<sup>3</sup> e.g. *Ellerman Lines, Ltd. v. Murray* and *White Star Line v. Comerford*, [1931] A.C. 126.

<sup>4</sup> The so-called Henry VIII clause, a style derived from the Statute of

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never have been made effective without this power; that for political reasons it had thus to be passed or not at all then; and thus that it is impossible to hold that such a clause is never defensible. But it is never defensible to exclude all judicial control; even in extreme cases, a short period—say three months at least—should be allowed for judicial examination. This has been done in the case of the ministerial confirmation of clearance orders and compulsory purchase orders, which may be challenged within six weeks only.<sup>1</sup> The Committee on Ministers' Powers<sup>2</sup> recommends also that each House should establish a Standing Committee to scrutinize every Bill conferring powers of legislation and every regulation so made, from the point of view of form, and to inform the House of any abnormalities. Each ministerial Bill should have an explanatory memorandum dealing with any power of delegation.

### § 6. JUDICIAL CONTROL

One of the most important functions of the Courts has been the restriction of the exercise of the power of delegated legislation. The task has been delicate and difficult, and naturally under war conditions a very wide application was given to the powers of delegated legislation accorded by the Defence of the Realm Acts. Thus it was held lawful to provide for the detention of a person of hostile origin, even if not guilty of crime, though Lord Shaw argued to the contrary in defence of liberty.<sup>3</sup>

On the other hand, where danger to the State was not involved, powers under the Act were firmly restricted. In *Chester v. Bateson*<sup>4</sup> it was ruled that a regulation providing that no proceedings could be taken for ejectment of workers on munition work without the assent of the Minister of Munitions was *ultra vires*. Special care has also been taken to minimize encroachment on property rights. Thus it was

Proclamations (p. 248, n. 6, *ante*). That it was well known in 1911 (Lloyd George, *Commons Debates*, xxx. 2016) is erroneous. The clause has of late been less freely used.

<sup>1</sup> Housing Act, 1930, s. 11.

<sup>2</sup> *Parl. Pap.*, Cmd. 4060, pp. 62–4. No action was taken in this sense in 1934.

<sup>3</sup> *R. v. Halliday; Zadig, Ex parte*, [1917] A.C. 260.

<sup>4</sup> [1920] 1 K.B. 829.

ruled<sup>1</sup> that the power of the Food Controller did not include the right to charge a fee of 2d. per gallon in return for giving a licence to purchase milk in a certain area under an order made in virtue of a regulation, and on this precedent it was ruled that the Shipping Controller could not demand payment in respect of licences to sell ships to foreigners under his powers under the British Ships (Transfer Restriction) Act.<sup>2</sup> The Court held that this amounted to imposing a tax without Parliamentary authority.

Liberty again was asserted in *O'Brien's Case*,<sup>3</sup> when it was ruled that a regulation under the Restoration of Order in Ireland Act, 1920, was rendered inoperative by the enactment of the Irish Free State Constitution in 1922. An apparent effort *ex post facto* by an Order in Council to make the regulation valid was regarded as ineffective by the Court of Appeal.

Recent instances of restrictive interpretation are afforded by the ruling that the power of the Minister of Transport to determine whether the proposal of a joint electricity authority to place an electric line over the lands of a non-consenting owner should be sanctioned, and to determine what terms, conditions, and stipulations should be attached to his consent, does not include the authority to fix pecuniary conditions.<sup>4</sup> Reference has been made above to the limited interpretation placed on the power of appeal to the Minister of Transport under the Road Traffic Act, 1930. Yet the Court has allowed as valid as a definition of a trade under the Trade Boards Act, 1918, the term 'catering trade', despite the many objections to so vague a term,<sup>5</sup> and the Minister of Transport has been allowed wide power of regulating the movements of motor coaches.<sup>6</sup>

<sup>1</sup> *Att. Gen. v. Wilts United Dairies* (1921), 37 T.L.R. 884; 38 T.L.R. 781.

<sup>2</sup> *Brocklebank, Ltd. v. R.*, [1925] 1 K.B. 52; *Marshall Shipping Co. v. R.* (1925), 41 T.L.R. 285. The decision in *Newcastle Breweries, Ltd. v. R.*, [1920] 1 K.B. 855, that a regulation could not deprive an owner of commandeered property of ordinary compensation is criticized in *Hudson's Bay Co. v. Maclay* (1920), 36 T.L.R., at p. 475.

<sup>3</sup> [1923] 2 K.B. 361; [1923] A.C. 603.

<sup>4</sup> *West Midland Joint Electricity Authority v. Pitt*, [1932] 2 K.B. 1.

<sup>5</sup> *R. v. Minister of Labour; National Trade Defence Assn.*, *Ex parte*, [1932] 1 K.B. 1.

<sup>6</sup> *R. v. Minister of Transport; Skylark Motor Coach Co.*, *Ex parte* (1931), 47 T.L.R. 325.

## CHAPTER V

### THE TITLE TO THE CROWN

#### § 1. THE HISTORY OF THE TITLE TO THE CROWN

THE title to the Crown of this country has been a very simple matter for a long time past, owing to the constitution of a Parliamentary entail by the Act of Settlement, and to the fact that the royal line has never failed since the House of Brunswick—now of Windsor<sup>1</sup>—succeeded under the provisions of that Act.

But inasmuch as disputed titles have played a large part in our history, and since the forms of the coronation recall the elements which went to make up the title to the Crown, it is worth while to review the history of the matter.

The Saxon King was the elect of the Witan, but, as in many other cases of seemingly free choice, the Witan were practically bound by conventions to choose from within a narrow circle. Outside the royal family they did not go, till conquest put constraint upon them, and Canute was chosen King. But within the royal family they were not limited by the modern rules of hereditary succession. Thus the title was made up of various elements. Royal birth was a preliminary qualification; the election by the Witan gave the legal sanction to a claim which would not have been made if the elected had not been born in the royal line; the ceremony of coronation confirmed the election with the support of the Church, and the oath of fidelity sworn by the nobles gave substantial force to hereditary, legal, and religious claims. From the time that Canute's line failed no King reigned who could show a good hereditary right till Henry II. Edward the Confessor was the eldest surviving son of Ethelred, but the son of his elder brother, Edmund Ironside, was still living. Harold's connexion with the house of Cerdic was remote if not imaginary, and here again Edgar, the grandson of Edmund, was the heir. William I claimed partly as next of kin, which was absurd, for he was a bastard: partly under the recommendation of

<sup>1</sup> Proclamation, 17 July 1917; A. Fitzroy, *Memoirs*, ii. 655, 656.

Edward the Confessor, who certainly had not acquired any right to the regard of the English people. But each of these Kings established a good legal title in election by the Witan, a title which was valid enough so long as the holder had physical force at his command to maintain it. The first four Norman Kings, whatever their claims may have been apart from election, showed the utmost respect for an election by that body which corresponded to the Witan, the Commune Concilium.

Gradually the notion of hereditary right grew stronger. This arose in part because the feudal land law, resting on the territorial character of kingship, assimilated the descent of the Crown to the descent of an estate in fee simple. And the rule of hereditary succession received readier acceptance in the more settled state of society. The fact that the Witan or Commune Concilium passed over the infant children of a deceased King in favour of a more vigorous member of the royal house, was evidence that hereditary right, popular election, and religious ceremonial, needed the help of a strong arm to maintain the right they conferred. The succession of Henry III and Richard II, especially of Richard, who had uncles living of full age and experience in affairs, shows that society so far recognizes legal right as to make an invasion of that legal right a difficult matter for an aggressor.

Meantime the title of our earlier Kings rested less upon such hereditary right as they might be able to assert than on the solemnity of election and coronation. The election by the Witan or Great Council of the realm gave the preliminary right to demand that the subsequent stages of the ceremonial which perfected the title should be gone through.

The ceremony of coronation, which gave religious sanction to the title by election, was preceded by the formal compact between King and people that the King should govern well, and that the people should obey. The King's promise made by oath or charter, or both, was to keep Church and people in peace, to forbid wrong and rapine in all degrees of men, and to do justice with mercy: the people by acclamation accepted him, the great men by oath promised him their fealty and allegiance, while the coronation service invested the title of the new King with the sanctity of divine approval.

That these ceremonials were no mere form is plain from the fact that there was a real interregnum between the death of one King and the election and coronation of another. Hence until the new King was crowned the King's peace was in abeyance; the maintenance of order might well be in jeopardy, while the State had no one to represent it for the purpose of enforcing the peace.<sup>1</sup>

As the conception of hereditary right strengthened, the importance of the election and coronation dwindled, and the practical inconvenience of the interregnum was curtailed.

The reign of Edward I began before his coronation. He was absent in Palestine when his father died. Four days after his father's death the Barons swore fealty to him in his absence, and three days later the royal Council put forth a proclamation in his name, announcing that he reigned by hereditary right and the will of the magnates, and that he enjoined the peace. The formal coronation did not take place for nearly two years. Edward II dated his reign from the day after his father's death. Edward III proclaimed the peace before he was crowned,<sup>2</sup> but he had been declared and accepted as guardian of the realm before his father's deposition, and in that capacity would be entitled to maintain the peace.

The depositions of Edward II and Richard II bring Parliament into the place occupied by the Witan and the Commune Concilium. The popular acclamation necessarily sinks into a mere form when the representatives of the Commons in Parliament become parties to the choice of a King. The accession of Henry IV is the best illustration of all the safeguards by which a medieval king could fence about his title to the throne. He was not satisfied with his election by the estates of the realm, with the resignation by Richard II of the fealty and allegiance of his barons, and the transfer of that fealty to himself. He claimed the Crown as descended from Henry III, reviving thus a tradition that Edmund

<sup>1</sup> Before the accession of Edward I the peace had been maintained by the Justiciar during the interval preceding the coronation of the new King; and hereditary right so far came in aid of the maintenance of the peace, that the prospective King claimed to be *lord of England*, and to enjoin the peace in that capacity; Pollock and Maitland, *Hist. of English Law*, i. 507.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 360, 368.

Crouchback, the second son of Henry III, was really the elder. His title thus based on election, on feudal recognition by the vassals of the Crown, on alleged hereditary right, was further confirmed by Parliament, and the Crown entailed by Statute on him and the heirs of his body.<sup>1</sup> But hereditary right, supported by force, broke through these carefully constructed defences.

Edward IV was proclaimed King as soon as he had successfully asserted his title by force and arms. His right to be proclaimed King was based not on election by estates of the realm, nor upon fealty sworn by the magnates, nor upon the formalities of the coronation. It was a mere question of pedigree. Edward IV was the nearest male representative of the eldest surviving line of Edward III, and on that ground he claimed to set aside not only the proceedings, regular otherwise and valid, which had placed Henry VI on the throne, but the Act of Parliament which had entailed the Crown upon the line of Henry IV.

From this time forth our history illustrates the conflict between two views of kingship, the one based on title by Parliamentary choice, the other on title by inheritance. The old forms of election give way to Parliamentary title.

Henry VII claimed the Crown by hereditary right, but gave his assent to a Bill which settled the Crown on himself and the heirs of his body.<sup>2</sup> Henry VIII obtained from Parliament a power to dispose of the Crown by will, and devised it, failing issue of Edward, Mary or Elizabeth, to the grandchildren of his younger sister,<sup>3</sup> thus disinheriting his elder sister Margaret and her issue. But, when James, the great-grandson of Margaret, succeeded to Elizabeth in spite of the Parliamentary entail created by the will of Henry VIII, he claimed to reign by hereditary right, and Parliament, though it fortified his title by an Act of Recognition, recited in the Act that he was entitled to reign by descent.<sup>4</sup>

Title by descent, and title by choice of Parliament, came to express two different views of kingship. But the force of either ground of claim was always recognized. The King who

<sup>1</sup> 1 Hen. IV, c. 1.

<sup>2</sup> 1 Hen. VII, c. 1.

<sup>3</sup> 28 Hen. VIII, c. 7; 35 Hen. VIII, c. 1.

<sup>4</sup> 2 Jac. I, c. 1; Tanner, *Const. Doc. of James I*, pp. 6-10.

claimed by hereditary right fortified his title by an Act of Parliament. The King who rested his title on an Act of Parliament recited in it his hereditary claims. The theory of hereditary right had in the Middle Ages possessed this advantage, that it dispensed with the interregnum which had prevailed when the title of the new King depended on his election. As feudalism passed away, the feudal bond ceased to furnish the ground of political obligation; hereditary right came in to supply the want, and was enhanced with divine sanction. Throughout the seventeenth century it was maintained by the upholders of the rights of kings, not only that the throne was never vacant and that the feudal rules of succession at once indicated an heir, but that the heir reigned by divine right, and that resistance to his rule or the recognition of any other title to rule was not merely unlawful but sinful. The official representative of his people was lost sight of in the ruler chosen by God.

### *The Settlement of 1688–9*

The two theories came to a practical issue in the reign of James II.<sup>1</sup> James left his kingdom and his subjects to take care of themselves: during his short reign he had not merely strained his indefinite prerogative in order to do violence to the spirit of the Constitution, but had again and again broken the law of the land, and his flight left no legal means of summoning Parliament. The Prince of Orange, on arriving in London, therefore summoned the Peers, as many of the members of the Parliament of Charles II as were in town, and some of the citizens, and by their advice he issued letters to the same effect as writs to the Lords Spiritual and Temporal, and to certain officers in counties and boroughs for the summons of a convention. The convention was a Parliament in every respect except the form of summons, and consisted of all the persons who would have been summoned to a regular Parliament.

The upholders of divine hereditary right were placed in a difficulty. To invite James to return without conditions was impossible, but to negotiate with a divinely appointed ruler was contrary to the principles of their political faith. What

<sup>1</sup> See Maitland, *Const. Hist.*, pp. 283–5.

was to happen if King and subjects could not come to terms ? Either the subjects must resist the King's return, or they must receive him back on his own terms. A middle course was proposed—the appointment of a Regent. This involved the assumption that James's unfortunate malady of mis-government reduced him to the position of an infant or lunatic, and that his rights remained to him, though they must be exercised by a representative. But if the people could determine the moment at which the King's misconduct justified his supersession, there was no reason why they should stop short at a Regency : the appointment of a Regent involved all the theoretical difficulties, without the practical convenience, of the choice of a new King. There were also these further objections, that a King *de facto* would coexist with a King *de jure*, neither of whom would acknowledge the rights of the other ; that a Regency being necessarily a temporary arrangement afforded no permanent solution of existing difficulties, while it might create others peculiar to itself.

On the other side it was said that the relation of King and subjects had always been one of mutual obligations, that Kings had before now been deposed for misgovernment, and that James had not only committed divers acts of misgovernment and illegality, but had deserted his people and taken refuge with a foreign power.

Common sense triumphed alike over sentiment and technicality. James II was alleged in the Declaration of Rights<sup>1</sup> to have 'abdicated' : it was left open to the one side or the other to interpret this as a voluntary or an involuntary retirement from the throne. More important were the next words—'the throne being thereby vacant'—for it was thus declared by the assembly of the estates of the realm that the throne, unlike a piece of real property, might be without an owner ; that its occupant was not necessarily designated by the rules of succession to an estate in land ; that the King might die in the sense that royalty might for the moment fall into abeyance ; and that this might happen not through some catastrophe, which extinguished the royal line by the death of all its representatives, but by the misconduct of a King, who,

<sup>1</sup> See 1 Will. & Mary, sess. 2, c. 1 ; the Acts of the Convention Parliament were reaffirmed by 2 Will. & Mary, c. 1.

having occupied the throne with an unimpeachable title, had been adjudged by his people to be unfit to reign.

When therefore it is said, as it often is said, that the prerogative of the Crown was very greatly affected by what happened in 1688 and 1689, we do well to bear in mind that the changes which then took place were either declarations of principle, or changes of practice, and that of actual legal limitation there was but little. Parliament had settled the succession to the Crown before, and it settled the succession again; only since the last occasion of a Parliamentary settlement the theory of divine right had arisen in support of the hereditary claim, and the conception of a royal prerogative superior to all the rules of law had survived the catastrophe of the Rebellion.

To this the action of the convention was a final answer; it was an assertion that the nation could depose a King for misgovernment, could give the Crown to another, and could determine the course of succession, and further, that the Crown could be given upon conditions. The Declaration of Rights (Feb. 1689) declared that James had abdicated, that the throne was vacant. As James did not admit this, he must be regarded as having been deposed. The Crown was then offered to William and Mary, during their lives and the life of the survivor, providing that the sole and full exercise of the royal power should be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives. By the Bill of Rights (Oct. 1689) the limitations after the death of the survivor were to the heirs of the body of Mary, failing them to the heirs of the body of Anne, and failing them to the heirs of the body of William.

### *The Settlement of 1701*

Such was the settlement of 1689, but in the year 1700–1 a further limitation of the Crown had become necessary. For Mary had died, and William was dying, and Anne had survived her numerous offspring, and had reached a childless middle age. It became necessary then to look for a Protestant, of kin to the royal line, who could be brought into the succession, and the nearest so qualified was Sophia, widow of

the Elector of Hanover, daughter of Elizabeth, Queen of Bohemia, the daughter of James I. The Crown, then, failing heirs of Anne and William, was settled on the heirs of the body<sup>1</sup> of Sophia, and under this Parliamentary Settlement the Crown is now held.

But the right to the Crown under this Settlement is subject to conditions,<sup>2</sup> for:

- (1) Every person who is or shall be reconciled to the Church of Rome, or shall hold communion with the Church of Rome, or shall profess the Popish Religion, or shall marry a Papist, becomes thereby excluded from, and incapable of, inheriting the Crown, the government of the realm, Ireland, and the dominions of the Crown, or any part of them: and incapable of exercising any regal power, authority, or jurisdiction in the same: the people are absolved from their allegiance; and the Crown goes to the next in succession being Protestant, as if the person who incurred the disability was dead.
- (2) Every King or Queen succeeding to the throne by virtue of the Act of Settlement was required to make the declaration against transubstantiation<sup>3</sup> at the first day of the meeting of the first Parliament, or at the Coronation.
- (3) Every King or Queen shall have the Coronation Oath administered at his or her Coronation, according to the provisions of 1 Will. & Mary, c. 6.
- (4) Every person who shall come into possession of the Crown shall join in communion with the Church of England.

There is much vagueness, as Macaulay has pointed out,<sup>4</sup> in the provisions of the first of these clauses. The Sovereign is subject to certain tests; no test is prescribed by which to

<sup>1</sup> The descent follows with slight deviations the rule of descent of land; it seems clear that an elder daughter takes precedence of a younger; contrast Lee, *King Edward VII*, ii. 33, where it is argued that the issue is still open.

<sup>2</sup> 1 Will. & Mary, sess. 2, c. 3; 12 & 13 Will. III, c. 2.

<sup>3</sup> This is provided in 25 Car. II, c. 2. Edward VII disliked the wording and urged change; Lee, *King Edward VII*, ii. 22-6. It was altered by the Accession Declaration Act, 1910, which merely insists on the King being a Protestant.

<sup>4</sup> Macaulay, *Hist.*, ch. xv.

ascertain the religious denomination of the person whom the Sovereign may marry. The words which follow as to the people being absolved from their allegiance have the same vague character; but this must needs be in attempting to make statutory provision for a revolution.

The Act of Union with Scotland in 1707 provided that the succession to the Crown of Great Britain should be the same as the succession provided for the Crown of England by the Act of Settlement, and a similar provision was inserted in the Act of Union with Ireland in 1800.

The title to the Crown of the United Kingdom of Great Britain and Ireland<sup>1</sup> is vested by Statute in the heirs of the body of Princess Sophia, who is the stock of descent, whose lineal heir must be sought on each occasion of the demise of the Crown. Under the Statute of Westminster, 1931 (Preamble), any change in the succession should be effected by concurrent legislation in the United Kingdom and the Dominions.

## § 2. MODERN FORMS

The forms which took place on the accession and coronation of King Edward VII are worth noticing, as illustrating some statements which have gone before. The same ceremonial was in effect followed in the case of George V in 1910 and 1911.

Queen Victoria died at Osborne on 22 January 1901 in the late afternoon, and on the following day the Lords of the Privy Council, of whom more than 100 were present, the Lord Mayor,<sup>2</sup> Aldermen, and other officials of the City of London, assembled at St. James's Palace to hear the reading by the Clerk of the Council of a Proclamation, which proclaimed King Edward VII.

<sup>1</sup> Altered to Northern Ireland by 17 & 18 Geo. V, c. 4.

<sup>2</sup> The Lord Mayor of London is summoned to the meeting at which a new Sovereign is proclaimed, but retires immediately after with the Aldermen who also attend. He has no rights as a Privy Councillor (*Greville Memoirs*, iv. 79–82). But Greville does not seem to have taken note of the differences in character, as apparent from the Proclamation, between the meeting at which Queen Victoria was proclaimed and the meeting of the Privy Council held immediately after. The *London Gazette* for 29 June 1837 gives the names of those present. The same difference is apparent at the Proclamation and subsequent assemblage of the Privy Council on 23 Jan. 1901, and similarly on Edward VII's death in 1910: A. Fitzroy, *Memoirs*, i. 41; ii. 404 f.

The Proclamation was in the following form:<sup>1</sup>

'Whereas it has pleased Almighty God to call to His mercy our late Sovereign Lady Queen Victoria of blessed and glorious memory, by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland is solely and rightfully come to the High and Mighty Prince Albert Edward. We, therefore, the Lords Spiritual and Temporal of this realm, being here assisted with these of her late Majesty's Privy Council, with numbers of others principal gentlemen of quality, with the Lord Mayor, Aldermen, and Citizens of London, do now hereby with one voice and consent of tongue and heart publish and proclaim that the High and Mighty Prince Albert Edward is now by the death of our late Sovereign of happy memory become our only lawful and rightful Liege Lord Edward the Seventh, by the Grace of God King of the United Kingdom of Great Britain and Ireland, Defender of the Faith, Emperor of India. To whom, we do acknowledge all faith and constant obedience with all heart and humble affection; beseeching God, by whom Kings and Queens do reign, to bless the Royal Edward the Seventh with long and happy years to reign over us.'

It should be noticed that the King was proclaimed, not by the Privy Council, but by the *Lords Spiritual and Temporal, and others*. This body is something more than the *Privy Council*. It represents a more ancient assemblage, the *Witan* or *Commune Concilium* meeting to choose and proclaim the new King.

The King then entered the Council Chamber and addressed the Council; and took and subscribed the oath for the security of the Church of Scotland, as required by the Act of Union. The late Queen's Privy Council were then sworn, and the King issued a proclamation continuing in their offices during pleasure all who, on the death of Queen Victoria, were 'duly and lawfully possessed of or fully invested in any office, place, or employment, civil or military', within the dominions of the Crown.<sup>2</sup> On 14 February the King made the declaration against transubstantiation in the presence of both Houses,<sup>3</sup> as required by the Bill of Rights and Act of Settlement.

The coronation of the King did not take place until

<sup>1</sup> For that used in 1910 see *London Gazette*, Suppl., 7 May 1910.

<sup>2</sup> *The Times*, 25 Jan. 1901, p. 11. This is rendered needless by 1 Ed. VII, c. 5.

<sup>3</sup> *Parl. Deb.*, 4th Ser. lxxxix. 27.

9 August 1902. The ceremonial is full of historical interest. It falls into three stages. The first is an important and necessary preliminary, and comprises the Recognition or formal acceptance of the new King by the people, and the Oath which embodies the King's undertaking of the duties of royalty.<sup>1</sup>

Next follows the series of ceremonies which invoke divine sanction upon the people's choice and confers upon royalty its sacred character, the anointing, the investiture, and the actual crowning. The third stage is the natural sequel to these. The King duly chosen, anointed, and crowned is placed upon his throne and receives the homage of the lords spiritual and temporal.<sup>2</sup>

First then comes the Recognition. The Archbishop, accompanied by the Lord Chancellor and the great hereditary officers of State, addresses the assemblage in these words:

'Sirs, I here present unto you King Edward, the undoubted King of this realm: Wherefore, all you who are come this day to do your Homage, are you willing to do the same?'

The people 'signify their willingness and joy by loud and repeated acclamations, all with one voice crying out, "God save King Edward"'.<sup>3</sup>

Until the coronation of Edward VII the King had been presented by the Archbishop turning to all four points of the compass. On 9 August 1902 the King was only presented once.

After some further ceremonials comes the Coronation Oath, administered by the Archbishop:

'Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the Dominions thereto belonging,<sup>4</sup> according to the Statutes in Parlia-

<sup>1</sup> The form and order of the Coronation Service is set out in Sir R. Phillimore's *Ecclesiastical Law* (2nd ed.) p. 813, but the service was in some respects altered and curtailed at the coronation of King Edward VII (Bodley, *Coronation of Edward VII*), by omitting the litany, the sermon, and first oblation of the pall or altar cloth and wedge of gold; these were restored in 1911; see *London Gazette*, Suppl., 27 Sept. 1911. Cf. Lee, *King Edward VII*, ii. 106–9.

<sup>2</sup> Wickham Legg, *English Coronation Records*, Introduction, p. xix.

<sup>3</sup> The people are for this purpose more especially represented by the boys of Westminster School, who rehearse beforehand the part played by the crowd at a medieval coronation.

<sup>4</sup> This phrase will no doubt be modified in any future oath.

ment agreed on, and the respective laws and customs of the same ?

‘I solemnly promise so to do.

‘Will you to the utmost of your power cause Law and Justice, in mercy, to be executed in all your judgments ?

‘I will.

‘Will you, to the utmost of your power, maintain the Laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law ? And will you maintain and preserve inviolably the Settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by Law established in England ? And will you preserve unto the Bishops and Clergy of England, and to the Church there committed to their charge, all such rights and privileges, as by law do, or shall appertain to them, or any of them ?

‘All this I promise to do.’

The Anointing<sup>1</sup> follows on the head, the breast, and the palms of both hands. Then comes the Investiture of the King with the regal vestments with the spurs, sword, orb and sceptre, then the putting on of the Crown, the gift to the King of a copy of the Bible, and the benediction. Then comes the final stage of the proceedings. The King has been accepted by his people and has given the assurances of the Coronation Oath: he has been, as it were, consecrated to the service of the State before the Crown is placed on his head. Now he ascends his throne and receives the homage of the Peers. At the Coronation of King Edward this was not done by every Peer, but first the Archbishop of Canterbury (the Bishops kneeling), then the Prince of Wales for himself and the Princes of the Blood Royal,<sup>2</sup> and then the premier nobles in each of the five ranks of the peerage, the Duke of Norfolk, the Marquis of Winchester, the Earl of Shrewsbury, Viscount Falkland, and Lord de Ros, uttered the words of Homage, touched the King’s Crown and kissed him on the left cheek.

The spiritual peer uses the following words:

‘I, ——, will be faithful and true, and Faith and Truth will bear, unto our Sovereign Lord, and your Heirs, Kings or Queens of the United Kingdom of Great Britain and Ireland. And I will do,

<sup>1</sup> First performed in the case of Egbert, son of Offa, King of Mercia.

<sup>2</sup> In 1911 the Prince of Wales and the Duke of Connaught did homage personally.

and truly acknowledge, the Service of the Lands which I claim to hold of you, as in right of the Church. So help me God.'

The Homage of the temporal peer is thus expressed:

'I, ——, do become your Liegeman of Life and Limb, and of earthly worship, and Faith and Truth I will bear unto you to live and die against all manner of Folks. So help me God.'

The portions of the ceremonial to which we have called special attention take us far back into the past.

The Recognition represents the great officers of the Witan or Council presenting the Sovereign of their choice to the assembled people, who are asked to record the national approval of the chosen King.

The Coronation Oath indicates the contractual character of English Sovereignty, a character which was common as well to the official chief of Saxon times as to the territorial lord of feudalism. The form survived the high prerogative days of the Tudors and Stuarts and the theory of Divine Right. The wording of the oath was settled immediately after the Revolution.<sup>1</sup> Its substance—to keep the Church and all Christian people in peace—to restrain rapine and wrong—to temper justice with mercy—is as old as the eighth century.<sup>2</sup>

The Anointing<sup>3</sup> is that which would seem to confer upon royalty its sacred character, and to give the sanction of the Church to the choice of the people, while the investiture blends the knightly and religious elements in the symbolic vestments and insignia of sovereignty.

The Homage of the Peers represents the taking of the oath of fidelity by the *Ministri* of Saxon times, and later by the great vassals of the Crown, which gave practical security to the new reign.

### § 3. INCAPACITY OF THE KING

We have now to consider how the rights and duties of royalty are affected, when the King, from one cause or

<sup>1</sup> Will. & Mary, c. 6.

<sup>2</sup> Stubbs, *Select Charters*, p. 62; excerpt from pontifical of Egbert, Archbishop of York, c. 760.

<sup>3</sup> The Anointing of Kings, a ceremony of great antiquity in India and elsewhere, was originally a magic rite intended to bestow strength on the sovereign; Keith, *Religion and Philosophy of the Veda*, ii. 340 f.

another, is incapable of discharging the duties of his office. This may arise in any one of four ways. (1) The King may be absent from the kingdom. (2) The King may be of imperfect capacity for his office by reason of his youth. (3) The King may have lost the capacity for his office by reason of his insanity. (4) The King may prove that he does not possess the capacity for his office from neglect of or contempt for the conditions under which it must be held.

In the first three cases the question arises of the constitution in one form or another of a Regency; in all four, difficulties may arise which are essentially similar in character.

(1) The absence of the King, until recent times, was met by the appointment of one or more persons to transact the formal business of government in his absence. Until the office of Justiciar fell into disuse in the reign of Henry III it had been customary that the Justiciar should discharge the duties of royalty during the absence of the King.

From this time it seems to have been most usual to appoint *custodes regni*, or *locum tenentes*, the first instance of such appointment being in the thirty-seventh year of Henry III, when the Queen and the Earl of Cornwall were made guardians of the realm during the King's absence in Gascony.<sup>1</sup> For the absence of Edward I at the time of his father's death special arrangements appear to have been made, and a small Council of Regency settled upon a year beforehand, but the arrangements were confirmed by a council of the magnates held shortly after the commencement of the reign.<sup>2</sup>

The appointment of Lords Justices under the Great Seal began with the absence of William III after the death of Mary, who, during her short reign, had been given power by Statute to exercise the royal prerogative whenever William was out of England.<sup>3</sup> The last instances of the appointment of a Regent, for this purpose, were in 1716, when the Prince of Wales was made Guardian and Lieutenant of the King-

<sup>1</sup> Stubbs, *Const. Hist.* ii. 67. For a list of such appointments see Report of Committee appointed in 1788 to inquire into precedents in cases of the royal authority being interrupted by sickness, &c.; *Parl. Paper, 1781-91* (Reports of Committees), iii. 80; *Comm. Journ.* xliv. 11-42.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 104.

<sup>3</sup> This did not disentitle William from exercising royal powers when abroad; 2 Will. & Mary, st. 1, c. 6.

dom,<sup>1</sup> and in 1732, when Queen Caroline occupied the same position. On other occasions since 1695 Lords Justices have been appointed under the Great Seal with powers specified in the Letters Patent, which gave them their commission.<sup>2</sup> This has not been done since 1821. The fact that the Sovereign is absent from the realm does not impair the validity of any executive act done during such absence, though Edward VII's appointment of Mr. Asquith to be Prime Minister when abroad was generally criticized in 1908; and modern facilities of communication have enabled the King to give the royal assent to bills by commission, and to transact other business without inconvenience to the conduct of government during his visits to the Continent.<sup>3</sup> During Edward VII's reign very much was done by correspondence in his frequent absences, and he refused to go far from contact with London, declining in 1908 an urgent invitation from the Canadian Parliament.<sup>4</sup>

In George V's absence in India in 1911-12 four Councillors of State were authorized to act<sup>5</sup> and this precedent was followed in his grave illness in 1928.<sup>6</sup>

(2) The infancy of the Sovereign raises other questions. The fiction of law is that the King must always be in the full maturity of intellectual power, and so would be exempt from the ordinary disabilities and immunities of infancy. Testamentary guardianship is the creation of Statute, nor has it ever been suggested that the prerogative enables a King to appoint a guardian to his successor.

In our early history the case of an infant sovereign was variously met. The Barons appointed a *Rector Regis et Regni* during the minority of Henry III, and a small Council with whom he should act; in the cases of Edward III and Henry VI Parliament made the nomination; the King himself and the magnates appointed a Council of Regency during the youth

<sup>1</sup> Cf. a proposed revival of this usage in 1895; *Letters of Queen Victoria*, 3rd Ser. ii. 476, 479, 482.

<sup>2</sup> See Turner, *The Cabinet Council*, ii. ch. xxi.

<sup>3</sup> See the reply of Lord Lyndhurst to Lord Campbell on the occasion of Queen Victoria's visit to Germany in 1845; *Parl. Deb.*, 3rd Ser. lxxxii. 1510.

<sup>4</sup> See Lee, *King Edward VII*, ii. 521, 522.

<sup>5</sup> A. Fitzroy, *Memoirs*, ii. 463 f., 468, 476.

<sup>6</sup> *London Gazette*, 4 Dec. 1928. On this occasion the Queen, Prince of Wales, Duke of York, Archbishop of Canterbury, Lord Chancellor, and Prime Minister were appointed.

of Richard II; but Edward III and Richard II were both capable of executing some of the formalities of government, and opened the Parliaments at which the Councils of Regency were chosen. The Privy Council made Richard of Gloucester protector of the realm during the brief reign of Edward V. In the reign of Henry VIII we come upon the first Regency Act, and the only one of the kind that ever took effect.<sup>1</sup> Parliament gave to Henry the power of nominating a Council of Regency, by Letters Patent or by will. This Council was to act in case the successor was a male and less than 18, or a female and less than 16 years of age. The King made the appointment and, though the Council exceeded its powers by making Somerset protector of the realm, its action was confirmed by the Lords and by Letters Patent issued by the young King himself.

On other occasions since the reign of Henry VIII Regency Acts have been passed, nominating, or giving to the King the power of nominating, a Regent<sup>2</sup> or a Council. But the duties of royalty have never since been discharged by a Regent in consequence of the infancy of the King.

(3) The insanity of the Sovereign is not a matter which can be provided for beforehand, as is possible in the case of a minority. Happily the difficulty which it occasions has only arisen in two reigns, those of Henry VI and George III. The proceedings in the reign of Henry VI are marked with much simplicity and common sense, as compared with those of the later reign. Early in 1454 the insanity of the King was attested by a committee of the Lords, and the Duke of York was chosen by the Lords to be protector and defender of the realm. He accepted the appointment, the proceeding was thrown into the form of an Act which received the assent of the Commons, and the Duke was Regent until the King recovered ten months later.<sup>3</sup> At the end of the year of his recovery Henry VI became once more insane; Parliament, which had been prorogued, met, and at the request of the Commons the Lords nominated a Protector, their choice again falling on the Duke of York. This time the King seems to

<sup>1</sup> 28 Hen. VIII, c. 7, s. 23.

<sup>2</sup> The last Act (now spent) was 10 Ed. VII and 1 Geo. V, c. 26.

<sup>3</sup> Stubbs, *Const. Hist.* iii. 166, 167.

have been able to go through some formalities, and to appoint the Duke by Letters Patent. In a few months he recovered.

In the reign of George III Parliamentary procedure had become so far settled as to raise technical difficulties which had not occurred to the Lords and Commons of the fifteenth century. And yet, when George III became insane, the Houses had the precedents of 1688 before them, and might have followed the procedure of the Convention Parliament, with this advantage, that at the time of James's flight Parliament was dissolved, while in 1788 a Parliament was in existence, though not sitting.

The Convention Parliament had proceeded by Address, requesting William and Mary to undertake the kingly office. It would have seemed obvious that the same course should be followed in 1788, and that the two Houses should present an address to the Prince of Wales requesting him to discharge the duties of royalty during the insanity of the King.

There was no practical dispute between Pitt and Fox as to the person who should be Regent. Fox maintained that the Prince had a right to the Regency, and that Parliament was bound to give effect to this right; Pitt held that the Prince had no right in the matter, but that he was the most proper person to be invited to become Regent. That which really exercised the two parties in the State was the limit which should be set upon the exercise of the prerogative by the Regent. Pitt wished to impose restraints but, inasmuch as the Prince was on friendly terms with the Opposition, Fox wished to minimize the restraints which were admittedly necessary. It was difficult, if not impossible, to combine procedure by address and limitation of powers. The Convention Parliament had affixed conditions to the tenure of the Crown but had not limited the prerogative. It followed that a Regency must be created by Statute: but a statute needed the royal assent: the King could not give the royal assent in person, nor could he authorize by Sign Manual the affixing of the Great Seal to a Commission which should enable others to give his assent.

The difficulty was overcome by a series of fictions. The two Houses were invited by ministers to concur in directing the Chancellor to put the Great Seal to a Commission for

opening Parliament, and subsequently to another Commission for giving assent to the Regency Bill when it had passed the two Houses. Before the matter reached this stage the King had recovered; but the same procedure was employed when in 1810 it became necessary to pass a Regency Bill.

It is to be observed that the Irish Parliament, being unaffected by the considerations of English parties, proceeded by address, and thus avoided the use of a fiction at once grotesque and dangerous.<sup>1</sup>

(4) The last form of royal incapacity for government is illustrated in the cases of Edward II, Richard II, and James II. The cases differ, since the first two were cases of formal, if involuntary, resignation, the last was a flight. The deposition of Edward II was marked by forms which do not conceal the violence of the transaction. Parliament was summoned by writs issued in the King's name by the younger Edward, who had been proclaimed guardian of the kingdom on the assumption that the King had fled. Before Parliament met the Great Seal had been obtained from Edward II, and the writs were issued in proper form. Parliament, having met, accepted the younger Edward as King, and drew up reasons for the deposition of Edward II; when the deposed King would not meet the Houses, they, by their procurator, renounced their homage and fealty.<sup>2</sup>

In the case of Richard II a deed of resignation was executed by the King, and presented to the Parliament summoned to receive it. A statement of reasons for his deposition was drawn up as in the case of Edward II; these were voted to be sufficient, Richard was deposed, and the sentence was communicated to him by Commissioners, who bore at the same time the renunciation of homage and fealty. It was not till then that Henry IV came forward to state to Parliament his claim to the throne; this was admitted, the assembly accepted him as king, and he was led to the throne.<sup>3</sup>

The case of James II has been fully treated earlier in this chapter.<sup>4</sup> It differs from the other cases mainly in two points.

<sup>1</sup> For a clear account of the Regency question as it presented itself to the British and Irish Parliaments, see Lecky, *Hist. of England in the Eighteenth Century*, vi. 416-27.

<sup>2</sup> Stubbs, *Const. Hist.* ii. 380.

<sup>3</sup> *Rot. Parl.* iii. 422, 423.

<sup>4</sup> See p. 265, *ante*.

James did not resign but fled, and the members of the Convention Parliament treated this flight as a constructive abdication, while they added in the Petition of Right such a list of misdeeds on the part of James as made the construction which they put on his flight amount to a formal deposition. And secondly, the question was complicated by the political theories and Parliamentary forms with which a medieval Parliament did not allow itself to be embarrassed; while the religious questions unknown to the thirteenth and fourteenth centuries caused religious disabilities to be attached to the Crown and gave a distinctly conditional character to its tenure.

#### § 4. THE DEMISE OF THE CROWN

We have still to consider the effect of the Demise of the Crown, either by death, or by forfeiture under the conditions of the Bill of Rights. We need only deal with the effects as illustrated by the death of the Sovereign.

We described in an earlier part of this chapter the steps by which the *interregnum* between the death of one King and the accession of another was bridged over. From the accession of Edward IV the new King was regarded as succeeding without interval of time to the rights of his predecessor; but the theory that Parliament was present in response to a personal summons from the King, and that ministers and others holding office or employment in the service of the State were the personal servants of the King, caused difficulties which have been gradually and entirely removed.

The rule that Parliament was dissolved by the death of the King might always have produced inconvenient results, but no steps were taken to remedy the inconvenience until the passing of 7 & 8 Will. III, c. 15, wherein it was enacted that a Parliament in existence at the time of a King's death should continue in existence for six months if not sooner dissolved by the successor to the throne. After the Union with Scotland this rule was extended by 6 Anne, c. 41, to the Parliament of Great Britain. The Act 37 Geo. III, c. 127, made further provision for the event of a demise of the Crown at a time when Parliament had been dissolved, and, finally, the Representation of the People Act, 1867,<sup>1</sup> makes

<sup>1</sup> 30 & 31 Vict. c. 102, s. 51, ss. 8, 9.

the duration of a Parliament independent of the demise of the Crown.

The tenure of office has raised questions of a different character. The practical inconvenience, and even danger, to which the legal theory might give rise became evident in the reign of Anne. In all probability the successor to the Crown, designated by Statute, would be in Hanover at the moment of the Queen's death. A rival claimant to the Crown was no farther off than St. Germains, and at this critical time the Privy Council would be dissolved, all the great offices of State would be vacant, and every commission in the Army would have lapsed.

For such circumstances the Succession to the Crown Act<sup>1</sup> provided that the Privy Council shall continue and act for six months and the holders of the great offices of State or the Household and every other person in any 'office, place, or employment, civil or military', within the dominions of the Crown, 'shall continue in their respective offices, places, and employments for six months next after such death or demise unless sooner removed or discharged by the next in succession'. The term of continuance was extended to eighteen months by 1 Will. IV, c. 4, in the case of 'office or employment in His Majesty's plantations or possessions abroad', and by an Act of 1837<sup>2</sup> commissions in the Army and Royal Marines were to continue in force until cancelled, notwithstanding a demise of the Crown.

So stood the law on the accession of King Edward VII; but in the case of ministers who were members of the House of Commons the matter was complicated by the existing law under which a seat in the House was vacated on the acceptance of office,<sup>3</sup> taken in conjunction with the Act of 1867 which made the duration of Parliament independent of the demise of the Crown, and thus created an anomaly.

It would seem that on previous occasions of a demise of the Crown, ministers continued to hold office under the provisions of the Succession to the Crown Act, unless sooner

<sup>1</sup> 6 Anne, c. 41, s. 8 (6 Anne, c. 7, Ruffhead).

<sup>2</sup> 7 Will. IV and 1 Vict. c. 31.

<sup>3</sup> 6 Anne, c. 41 (c. 7, Ruffhead). The vacating of seats was finally cancelled by the Re-election of Ministers Acts, 1919 and 1926.

dismissed, and that such forms as they went through for the purpose of indicating that they were ministers of the new Sovereign were not regarded as an acceptance of office such as would at once vacate a seat.<sup>1</sup>

On 23 January 1901 the King issued a Proclamation directing every person who, at the time of the death of Queen Victoria, held any office, place, or employment, civil or military, in any part of the King's dominions, to proceed in the duties of their respective offices during the royal pleasure. Provision was also made for the continued use of the existing seals until new seals were prepared.

On 23 and 24 January the principal ministers of the Crown kissed the King's hands and took the official oath.

'I, ——, do swear that I will well and truly serve His Majesty King Edward VII in the office of ——. So help me God.'

None of the formalities incident to an original appointment were gone through, no patents were cancelled and reissued, nor were seals delivered up and returned; but it was questioned whether ministers had not by acceptance of office under the new King at once vacated their seats, or whether the vacancies would be postponed to the end of the first six months of the new reign.

These questions were raised in the discussions on the Demise of the Crown Bill<sup>2</sup> and settled by its passing.

Some legislation on the subject was in any case necessary, for the Succession to the Crown Act did not apply to offices held abroad, or held within the protectorates which technically are not included within the dominions of the Crown.

The Demise of the Crown Act<sup>3</sup> briefly enacts that:

- (1) The holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown.

<sup>1</sup> William IV died on 20 June 1837, and Parliament was dissolved on 17 July. Between those dates certain of the principal ministers went through some of the formalities of reappointment. See the *London Gazette* for July 1837. But the reappointment of the two Secretaries of State who were members of the House of Commons did not take place until the day of the dissolution.

<sup>2</sup> See debate on the second reading of the Bill, 1 April 1901, *Parl. Deb.*, 4th Ser. xcii. 382.

<sup>3</sup> 1 Ed. VII, c. 5.

(2) The Act shall take effect as from the last demise of the Crown.

Thus the demise of the Crown no longer affects the duration of Parliament, nor the tenure of office, though legislation has in no way affected the prerogative of the Crown as to the dissolution of Parliament or the dismissal of ministers.

### § 5. THE KING'S FAMILY

We must, in conclusion, consider what are the relations of the King or Queen Regnant to the royal family, and wherein the family relations of the Sovereign differ from those of a subject.

The Queen Consort is a subject, though privileged in certain ways. She is not entitled as of right to claim coronation, as was ruled in Queen Caroline's case. In 1911 she was crowned by the Archbishop of Canterbury. Her life and chastity are protected by the law of treason; if accused of treason she is entitled to trial by the House of Lords, as in Anne Boleyn's case. She was always regarded as free from the disabilities of married women in matters of property, contract, and procedure. She could and can acquire and deal with property, incur rights and liabilities under contract, sue and be sued, as though she were *feme sole*. She may have her separate officers and legal advisers. But in all other respects she is a subject, and amenable to the law of the land, save in respect of some small privileges which are not in use. At one time she had a revenue from the demesne lands of the Crown, and a portion of any sum paid by a subject to the King in return for a grant of any office or franchise. This was the *aurum reginae* or queen-gold,<sup>1</sup> but this fell into disuse after 1660 when the feudal tenures fell. Provision is now made by Statute for the maintenance of a Queen Consort.

A Queen Dowager ceases to be under the protection of the law of treason. It is said by Coke that she may not marry again without the King's licence, but this is questioned,<sup>2</sup> for the alleged statute on which Coke's assertion rested is of dubious authenticity.

<sup>1</sup> Blackstone, *Commentaries*, i. 220. Queen-gold is the subject of a learned treatise by Prynne.

<sup>2</sup> Blackstone, *Comm.* i. 223.

A Queen Regnant holding the Crown in her own right has all the prerogatives of a King.<sup>1</sup> The position of the husband of a Queen Regnant has varied in each case that has arisen.

On the marriage of Mary Tudor with Philip of Spain it was provided that the Queen should enjoy all the prerogatives and possessions and exercise all the powers of the Crown as sole Queen, though official documents should issue in their joint names; that Philip should not alter the laws, nor compel the Queen to leave England, nor introduce aliens into office, nor if he survived his wife set up any claim to power or property.<sup>2</sup> A later Act made it treason to compass his death. It is impossible to read the first of these Statutes without being struck by the difficulties which must have arisen if Philip had wished to reside in England or had taken an active interest either in his wife or her kingdom.

William III declined to be a King Consort: and the Bill of Rights provided that 'entire, perfect, and full exercise of the regal power should be only in and executed by his Majesty in the names of both their Majesties during their joint lives'. When William was absent from the kingdom, Mary was given a general power to 'exercise and administer the regal powers and government', saving the validity of acts of state done by William during his absence abroad.<sup>3</sup>

George of Denmark did not occupy so favourable a position. He had been introduced into the Privy Council, though not sworn, in 1685, and he was naturalized by Act of Parliament in 1689. But by the time that Anne succeeded to the throne the Act of Settlement had been passed, and he would have fallen under the disqualifications as to property and office which attached to aliens as soon as that Act came into force by the death of Anne. This disability was cured by a clause in an Act which enabled the Queen to grant him a revenue if he survived her,<sup>4</sup> but he died before his wife. George was therefore a subject of the Queen, differing from others only in the conditions of his naturalization.

When Queen Victoria had declared her intention to ally herself in marriage with Prince Albert of Saxe-Coburg and

<sup>1</sup> This was declared by Statute in 1554; 1 Mary, Sess. 3, c. 1. See also 52 & 53 Vict. c. 63, s. 30.

<sup>3</sup> 2 Will. & Mary, st. 1, c. 6.

<sup>2</sup> 1 & 2 Ph. & M. c. 10, s. 3.

<sup>4</sup> 1 Anne, c. 2.

Gotha, the Prince was given by Statutes<sup>1</sup> the full rights of a citizen of the United Kingdom when and so soon as he had taken the oaths of allegiance and supremacy. The Prince was therefore a subject of the Queen. Like George of Denmark he was introduced into the Privy Council but not sworn,<sup>2</sup> unlike him he was never a Peer of Parliament. His precedence was determined by an exercise of the prerogative in 1840 to be next to that of the Queen, and in 1857 the title of Prince Consort was conferred upon him by Letters Patent. As a matter of law he differed only in title and precedence from any other subject of the Queen,<sup>3</sup> without any procedural privileges.

Of the children of a reigning Sovereign, the eldest son and daughter, and the eldest son's wife, alone have any special privilege. Since 1337 the eldest son is Duke of Cornwall by birth, and is created Prince of Wales and Earl of Chester by Letters Patent, a practice dating from 1284. It is treason to compass his death, or to violate the chastity of his wife, or of the eldest daughter, unmarried, of the King or Queen. The eldest daughter is usually given the style of Princess Royal for life. It is now held by Princess Mary. But the royal children have only such precedence as is conferred upon them in the Parliament and Council Chamber by an Act of Henry VIII.<sup>4</sup> The children of sons of the King are given the style of Royal Highness by Letters Patent.<sup>5</sup>

In 1717 the judges by a majority of 10 to 2 advised that the care and education of the King's grandchildren, being

<sup>1</sup> 3 & 4 Vict. cc. 1 and 2. The first of these Acts set aside the effect of 1 Geo. I, st. 2, c. 4, which forbade the passing of any naturalization bill without a clause confirming the political incapacities imposed by the Act of Settlement. This Act was repealed in 1867.

<sup>2</sup> *Greville Memoirs*, iv. 269, and see Greville's pamphlet on 'The Royal Precedency Question', printed as an Appendix to vol. iv; *London Gazette*, 6 Mar. 1840.

<sup>3</sup> The question whether he should be made a peer was discussed. Queen Victoria urged sound reasons against such a course; *Letters of Queen Victoria*, i. 252.

<sup>4</sup> 31 Hen. VIII, c. 10. The King's sons, though not privy councillors by birth, can be introduced into the Council when the King pleases. But on the demise of the Crown they were not privy councillors of the new Sovereign until sworn; *Greville Memoirs*, iv. 274. Presumably this is now affected by 1 Ed. VII, c. 5.

<sup>5</sup> *London Gazette*, 5 Feb. 1864.

minors, belonged to the King, the rights of the father being to this extent superseded. The question arose in the quarrels of George I and his son. No such point was raised in the disputes which raged between George II and Frederick, Prince of Wales; but George III, early in his reign, quarrelled with his brothers for marrying subjects, and obtained the passing of the Royal Marriage Act.<sup>1</sup> By this Act no descendant of the body of George II, except the issue of princesses married into foreign families, can make a valid marriage unless the King or Queen Regnant has given consent under the Great Seal. But such descendants at the age of 25 may marry without the royal sanction, after giving twelve months' notice to the Privy Council, unless during that time the two Houses of Parliament have expressed disapproval. It is, of course, anomalous that the King should have this power,<sup>2</sup> but naturally its abrogation could not be proposed save on his initiative.

<sup>1</sup> 12 Geo. III, c. 11; for the cause of its passing, procured by exceptional pressure on the Ministry and Parliament by George III, see *Annual Register*, 1772, pp. 83, 84; *Corr. of George III*, ii. 328–32. It is asserted to have been in affirmation of the King's rights at Common Law, but it made void marriages which hitherto were good in law.

<sup>2</sup> Cf. its application to Prince Ernest of Cumberland in 1913; A. Fitzroy, *Memoirs*, ii. 505 f. Assent is declared in Council, and a form of consent signed, as on 22 Nov. 1921 (Princess Mary) and 5 Oct. 1934 (Prince George).

## CHAPTER VI

### THE CROWN AND THE SUBJECT

#### § 1. ALLEGIANCE AND NATIONALITY

THE Sovereign in the Coronation Oath promises good government, his subjects owe him allegiance, but it is only to a very limited extent that subjects are required to take the oath of allegiance, the form of which is fixed by 31 & 32 Vict. c. 72, or an affirmation to like effect, permitted by the Oaths Act, 1888.<sup>1</sup> Hence, when the Parliament of the Irish Free State abolished, despite the terms of the treaty of 6 December 1921, of the Constitution, and of the Act No. 1 of 1922 giving force of law to the Constitution, the oath to be taken by members of the Parliament of the State, it was not contended that in this way any derogation was made from the allegiance due to the Crown by citizens of the Irish Free State, or that their status had been altered in any way.<sup>2</sup>

Allegiance is due from resident aliens as well as from subjects; in the former case it is local, in the latter natural, and a subject owes allegiance wherever he may be.<sup>3</sup> An alien, even if his sovereign is at war with the British Crown, none the less owes allegiance to the Crown while on British territory, and he may not do anything hostile to the Crown without exposing himself, if his action was intentional, to the penalties for treason.<sup>4</sup> This applies even if the territories of the King have been invaded, and his forces for the time have evacuated them: 'It is the duty of a resident alien so to act that the Crown shall not be harmed by reason of its having admitted him as a resident.'<sup>5</sup>

Allegiance, no doubt, was originally an essentially personal tie, binding two individuals by mutual assurances of fidelity

<sup>1</sup> 51 & 52 Vict. c. 46.

<sup>2</sup> Keith, *The Constitutional Law of the British Dominions*, p. 66. It is, however, the view of Mr. de Valera that under the Irish Nationality and Citizenship Act, 1935, the bond of allegiance will no longer exist between Irish citizens and the Crown.

<sup>3</sup> *R. v. Casement*, [1917] 1 K.B. 98.

<sup>4</sup> *R. v. Ahlers*, [1915] 1 K.B. 616.

<sup>5</sup> *De Jager v. Att. Gen. of Natal*, [1907] A.C. 329.

and protection; it is now a test of citizenship, a mode of ascertaining to what country a man belongs.

Allegiance differs from homage and from fealty. Fealty is the simple undertaking to be faithful, an undertaking fortified by an oath. Homage is the undertaking to be faithful in respect of land, binding the vassal to the lord of whom he holds lands. Allegiance is the duty, which every man owed, to be faithful to the head of the nation, land or no land.<sup>1</sup> And, as the King was supreme landowner and judge, the ideas of homage and fealty, in the case of the holder of lands, were merged in allegiance.

The territorial character of feudal sovereignty made a man's allegiance depend, not on his parentage, but on the place of his birth. A Frenchman, born in the dominions of the Crown, could not escape the liabilities, nor could a man born of English parents abroad acquire the rights of an English citizen. *Nemo potest excire patriam.*

But a man might be a citizen of this country, though by birth and parentage he belonged to another, if both were in allegiance to the same King, and he were born after the King had acquired the Crown of England. *Calvin's Case*<sup>2</sup> decided that persons born in Scotland after, but not before, James I succeeded to the English Crown were born in the allegiance of the King of England, and were citizens of both countries; and in like manner the English *post nati* were citizens both of Scotland and England. But if the Crowns are severed the citizenship thus acquired may be lost. Hanoverians born in Hanover while William IV was King of Hanover were citizens of the United Kingdom, but they became aliens upon the accession of Queen Victoria.<sup>3</sup>

The Common Law rule on the subject is clear. A person born in the dominions of the King is a natural-born British

<sup>1</sup> The limitation of liege homage—free or undisputed homage—to the homage done to the King was of gradual growth. 'Liege' means 'free', 'undisputed', 'unconditional', and has no connexion with 'ligare'; Skeat, *Dict.*, s.v. *Liege*; Pollock and Maitland, *Hist. of English Law*, i. 279, 280. The oath of fealty required by the Norman Kings of their subjects was independent of all conditions of tenure, or of fealty due to another, and thus 'ligeance' or 'allegiance' came to mean the fealty due to the King.

<sup>2</sup> 2 St. Tr. 559 (e).

<sup>3</sup> *Isaacson v. Durant; Stepney Election Petition, In re* (1886), 17 Q.B. D. 54. This was contrary to the view expressed in *Calvin's Case*.

subject; a person born beyond the limits of the King's dominions is an alien. A man might be made a subject by Statute, or a denizen by prerogative, but the Act of Settlement forbade such a person from holding office or a place in the Privy Council or either House of Parliament, or receiving lands from the Crown.

Statute law engrafted on these rules the following exceptions.

1. A person born abroad whose father was a natural-born British subject,<sup>1</sup> and the son of a person so born abroad,<sup>2</sup> were to all intents and for all purposes natural-born British subjects, always assuming that the father up to the date of the birth had done nothing to divest himself of his British nationality.

But this statutory exemption was construed strictly, as it derogated from the Common Law. If a natural-born British subject settled in France, his son and his grandson (assuming the family to continue to reside in France) were natural-born British subjects. But his great-grandson was an alien.<sup>3</sup>

2. An alien might obtain a certificate of naturalization under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), after five years' residence in England, and might then acquire all the political and other rights and obligations of a natural-born British subject.<sup>4</sup> He need not lose his earlier nationality, but then he was not deemed to be entitled to protection as a British subject when within the limits of the State whose citizenship he retained.

3. If the person who obtained such a certificate of naturalization were the father or widowed mother of a child, who at the date of the certificate was an infant, and who became resident with the father or mother in the United Kingdom, or resided with his father while the latter was in the service of the Crown out of the United Kingdom,<sup>5</sup> such a child became a naturalized British subject.<sup>6</sup>

But here again the statutory exemption was construed strictly. The child of a naturalized alien, if of full age at the date of the naturalization, was unaffected by it. If born

<sup>1</sup> 4 Geo. II, c. 21, s. 1.

<sup>2</sup> 13 Geo. III, c. 21.

<sup>3</sup> *De Geer v. Stone* (1882), 22 Ch. D. 243.

<sup>4</sup> 33 & 34 Vict. c. 14, s. 7.

<sup>5</sup> 58 & 59 Vict. c. 43.

<sup>6</sup> 33 and 34 Vict. c. 14, ss. 4, 10.

abroad after the naturalization he did not fall under the provisions of 13 Geo. III, c. 21.<sup>1</sup>

4. The marriage of an alien woman with a British subject made her a British subject; conversely the marriage of a female British subject with an alien made her an alien.<sup>2</sup>

5. A foreigner born in the United Kingdom might under the Naturalization Act make a declaration of alienage and so divest himself of the allegiance which the locality of his birth imposed upon him.<sup>3</sup> And a British subject of the King might do what is equivalent to a declaration of alienage, and divest himself of his British nationality by becoming a naturalized citizen of a foreign state.<sup>4</sup>

6. An Act of Parliament can do anything, and a foreigner might be naturalized by Statute,<sup>5</sup> so as to make his children under all circumstances subjects of the Crown.<sup>6</sup>

The law of nationality remained unaltered in essentials until 1914. It was then attempted to deal with three points of special difficulty. (1) It was desired to secure the limitation of British nationality by descent only, so as to avoid the creation of persons with double nationality resident abroad. (2) It was, on the other hand, intended to secure continued inheritance of British nationality in cases where families were settled on territory formally foreign, but virtually British, such as then was Southern Rhodesia. (3) As matters stood, local naturalization could be obtained under colonial legislation, but such persons were not British subjects beyond colonial limits.<sup>7</sup> It was therefore desired by agreement with

<sup>1</sup> *Bourgeoise, In re* (1889), 41 Ch. D. 310.      <sup>2</sup> 33 & 34 Vict. c. 14, s. 6.

<sup>3</sup> This cannot be done in war: *Freyberger, Ex parte*, [1917] 2 K.B. 129; *Vecht v. Taylor* (1917), 116 L.T. 446; *Gschwind v. Huntingdon*, [1918] 2 K.B. 420. The Act of 1914, s. 14 (2) extends the power to make a declaration of alienage to those who, born out of the British dominions, are British subjects under s. 1 (1) (b).

<sup>4</sup> But a British subject cannot divest himself of his nationality by becoming naturalized in an enemy's state in time of war. Not only would he have no defence on this ground for treasonable acts, but such naturalization is itself an act of treason; *R. v. Lynch*, [1903] 1 K.B. 444. See 4 & 5 Geo. V, c. 17, s. 13.      <sup>5</sup> Co. Litt. 129 a.

<sup>6</sup> The Crown can confer a *quasi*-naturalization by Letters Patent. The person so privileged is called a *denizen*; Blackstone, *Comm.* i. 374. He is, since 1870, in no better position practically than an alien, and the practice though still possible is probably obsolete.

<sup>7</sup> *R. v. Francis; Markwald, Ex parte*, [1918] 1 K.B. 617; *Markwald v. Att. Gen.*, [1920] 1 Ch. 348.

the Dominions, achieved at the Imperial Conference of 1911, to establish an imperial naturalization available throughout the Empire. The Act of 1914<sup>1</sup> was, however, soon amended, partly<sup>2</sup> to increase the powers of the Crown to cancel naturalization, found desirable in view of the hostile activities of certain naturalized persons, and partly<sup>3</sup> to offer British subjects resident in foreign countries a means of preserving their nationality from generation to generation.

The result of these Acts, in the first of which the character of the natural-born British subject is defined in full, is briefly as follows:

Any person born on British territory is a natural-born British subject, with the negligible exception of children born in foreign embassies or in territory occupied by the enemy, being children of alien enemies.<sup>4</sup> Birth on a British ship has a like result, but birth on a foreign ship in British territorial waters does not *per se* confer British nationality,<sup>5</sup> the connexion with the territorial sovereignty being too slight to justify ascription of nationality.

A child born not on British territory is *prima facie* not a British subject, but this rule has important exceptions. The child of a British father<sup>6</sup> (not mother) is a British subject though born on foreign territory if (1) his father was born on British territory or in a country where the Crown exercises extra-territorial jurisdiction (e.g. Egypt, China, Abyssinia, (Ethiopia), or Morocco) including British protectorates; or (2) his father was a naturalized British subject; or (3) his father had become a British subject by annexation of territory (e.g. the Transvaal, Orange Free State, or Cyprus);<sup>7</sup> or (4) his father was in the service of the Crown; or (5) his birth was registered within a year after birth by a British consulate, but

<sup>1</sup> British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V, c. 17).

<sup>2</sup> 8 & 9 Geo. V, c. 38.

<sup>3</sup> 12 & 13 Geo. V, c. 44; Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 151, 156, 157.

<sup>4</sup> Act of 1914, s. 1. The persons excluded are born in the King's dominions but not in his allegiance.

<sup>5</sup> Ibid. s. 1 (1) (c) and (2).

<sup>6</sup> Ibid. s. 1 (1) (b). A posthumous child is not included, the qualification depending on the condition of the father at the time of the child's birth.

<sup>7</sup> See S.R. & O., 1929, No. 1239; *Gout v. Cimitian*, [1922] A.C. 105.

in this case the child must within a year after age 21 make a declaration of retention of British nationality and (if this is possible under foreign law) at the same time renounce any foreign nationality. The last clause enables such communities as the British in Argentina to preserve their national status *ad infinitum*.

Naturalization<sup>1</sup> is provided for on the basis of concurrent action by the Dominions, all of which (save the Irish Free State) have accepted by their legislation the Act of 1914. The condition of five years' residence before eligibility may be fulfilled by one year's United Kingdom residence before application, and four years' residence there or in some other part of the British dominions within eight years before the application. The applicant must be of good character and have an adequate knowledge of English, and intend to reside in the British dominions or to remain in or to enter the service of the Crown. The decision to grant is absolutely in the discretion of the Home Secretary. Dominion governments have like powers,<sup>2</sup> but in their case knowledge of another official language (e.g. Afrikaans in South Africa or French in Canada) may suffice. Naturalization becomes effective only on taking the oath of allegiance.

The Home Secretary may include the name of any minor child of the alien naturalized in the certificate, but such a child may within a year after age 21 make a declaration of alienage.<sup>3</sup> He has also discretionary powers to waive conditions in the case of women formerly British subjects, who lost that status on marriage but whose marriage has been dissolved,<sup>4</sup> and to grant certificates to persons of doubtful nationality;<sup>5</sup> or to persons naturalized under earlier legislation.<sup>6</sup>

Naturalization confers the status of a natural-born British subject, including the right to sit in the Privy Council if appointed thereto.<sup>7</sup> But a naturalized subject, unlike a natural-born subject, may be deprived of his nationality if (1) he has obtained it by false representation or fraud or by

<sup>1</sup> Act of 1914, s. 2.

<sup>2</sup> Ibid. s. 8. Colonial Governors may also grant certificates, but the Home Secretary must confirm.

<sup>4</sup> Ibid. s. 2 (3).

<sup>5</sup> Ibid. ss. 4, 5 (2).

<sup>3</sup> Act of 1914, s. 5.

<sup>6</sup> Ibid. s. 6.

<sup>7</sup> Ibid. s. 3; *R. v. Speyer*, [1916] 2 K.B. 858.

concealment of material facts, or (2) he has proved himself by act or speech disloyal.<sup>1</sup> The Home Secretary may deprive the wife and children of a naturalized person, who is deprived of nationality, of their nationality subject to certain conditions; if he does not do so, the wife within six months may make a declaration of alienage for herself and her minor children.<sup>2</sup>

The position of married women has been improved by an Act of 1933,<sup>3</sup> passed to give effect to portions of a convention concluded at The Hague. Under it a woman does not lose her British nationality on marriage with an alien unless she thereby acquires his nationality. Moreover, if her husband loses British nationality during marriage, she only loses it if she acquires his new nationality, and she may within a year make a declaration of retention of British nationality. Moreover, as formerly, if her husband is an alien enemy, she may make a declaration of desire to resume British nationality if she had such nationality by birth, and at his discretion the Home Secretary may give her a certificate of naturalization. Similarly an alien woman who marries a British subject becomes a British subject as if natural born, but on naturalization of a husband she does not obtain British nationality unless she declares within twelve months her desire to acquire such nationality.<sup>4</sup>

If a British subject loses nationality by foreign naturalization or otherwise, minor children also lose that nationality if they acquire the nationality of the father, but this does not apply to the children of a widow who acquires foreign nationality by marriage. Children who thus lose nationality may reacquire it by declaration within a year of majority.<sup>5</sup>

A widow does not automatically change nationality acquired by marriage on her husband's death or divorce.<sup>6</sup>

Annexation of territory by the Crown carries with it the British nationality of those subjects of the late government who do not evacuate the territory, and British subjects lose nationality by disannexation, acquiesced in by the Crown.<sup>7</sup>

<sup>1</sup> *Ibid.* s. 7.

<sup>2</sup> Act of 1914 (as amended in 1918), s. 7A.

<sup>3</sup> 23 & 24 Geo. V, c. 49.

<sup>4</sup> Act of 1914 (as amended in 1933), s. 10 (5).

<sup>5</sup> Act of 1914, s. 12.

<sup>6</sup> Act of 1914, s. 11.

<sup>7</sup> *Doe d. Thomas v. Acklam* (1824), 2 B. & C. 779; *Doe d. Auchmuty* v.

## § 2. TREASON

The law of treason is connected with the law relating to allegiance in two ways.

As allegiance is always due from British subjects wherever they are, any subject who acts disloyally overseas may be punished if he at any time can be apprehended in England. This is expressly provided for in an Act of Henry VIII,<sup>1</sup> which purports to be declaratory and which deals with treason or misprision of treason. Treason is thus an exception to the rule that crime is normally local,<sup>2</sup> though murder, manslaughter,<sup>3</sup> bigamy,<sup>4</sup> and some less important crimes<sup>5</sup> committed overseas can be punished in England. Thus Governors can be punished for crimes committed overseas as in the case of the illegal exercise of martial law.<sup>6</sup>

Again, treason, when we first get an approximate definition of the offence, depended, like allegiance, on the personal character of the feudal relation. Treason was an offence against the person, the representatives, or the personal rights of the King: it was a breach of the feudal bond, a betrayal in one form or other of a lord. The vagueness of the early law on this subject led to a request by the Commons in 1352 that the King would legislate on the subject of treason, and the answer to their request was the Statute on which the law of treason is still founded.<sup>7</sup> 25 Ed. III, st. 5, c. 2, names seven distinct offences:

(1) To compass or imagine the King's death, the Queen's (but not if a dowager or divorced), or that of the heir to the

*Mulcaster* (1826), 5 B. & C. 777; *Bruce, In re* (1832), 1 L.J. (N.S.) Exc. 153; *Doe v. Arkwright* (1833), 5 C. & P. 575; *Keith, State Succession*, ch. vi.

<sup>1</sup> 35 Hen. VIII, c. 2, s. 2. Cf. *R. v. Lynch*, [1903] 1 K.B. 444; *R. v. Casement*, [1917] 1 K.B. 98.

<sup>2</sup> *Macleod v. Att. Gen. for New South Wales*, [1891] A.C. 455.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 9.

<sup>4</sup> 24 & 25 Vict. c. 100, s. 57; *Trial of Earl Russell*, [1901] A.C. 446.

<sup>5</sup> e.g. perjury committed abroad in respect of transactions to take place in England; *Perjury Act*, 1911, s. 6; *Forgery Act*, 1913, s. 14.

<sup>6</sup> *R. v. Eyre* (1868), L.R. 3 Q.B. 487; *R. v. Picton* (1805), 30 St. Tr. 225; *Wall's Case* (1802), 28 St. Tr. 51.

<sup>7</sup> Maitland has pointed out that the object of the promoters of this Statute was not so much to define the limits of political obligation as to mark the distinction between treason and felony; the former resulted in a forfeiture to the King, the latter in an escheat to the lord; Pollock and Maitland, *Hist. of English Law*, ii. 506.

throne ; (2) to levy war against the King in his realm ; (3) to adhere to the King's enemies ; (4) to violate the King's wife, the wife of his eldest son, or his eldest daughter, being unmarried ; (5) to counterfeit the Great Seal, the Privy Seal, or coin ; (6) to issue false money ; (7) to kill the Chancellor, Treasurer, King's Justices of either bench, or of assize, in the discharge of his office.

One cannot fail to notice the personal character of all these offences. The King—not the Crown in Parliament, or the State as embodied in the existing constitution—is the object which the Statute designs to protect. The King's person ; the King's sovereignty ; the King's family relations ; the *indicia* of the royal will in administration, the seals ; the representatives of the royal will in judicature, the Chancellor and judges ; the privileges of royalty, the coinage : these are what a feudal society thought it treason to infringe.

The last four offences need no special notice ; they remain as treasons on the Statute book, though they may be dealt with as felony.<sup>1</sup> The first three have been extended by construction, and have been the subject of much legal comment.

The additional treasons chiefly created in the reign of Henry VIII, of Elizabeth, and Anne, none of long duration, and now repealed, will be found to fall into two classes. They were the product of statutes which aimed at securing the kingdom against the aggression or influence of the Pope, or else at securing the succession to the throne as at the time settled.

But the extensions by construction of the Statute of Edward III are important in legal history. Compassing or imagining the King's death was construed to mean any act directed to the deposition or imprisonment of the King, or to acquiring the control of his person, or any measure concerted with foreigners for an invasion of the kingdom, or going or intending to go abroad for such purpose.<sup>2</sup> Cases of mere riot were treated as 'levying war against the King'.<sup>3</sup>

The Riot Act, 1 Geo. I, st. 2, c. 5, made it unnecessary to

<sup>1</sup> 24 & 25 Vict. cc. 98, 99, 100.

<sup>2</sup> *R. v. Horne Tooke* (1794), 25 St. Tr. 1, 725; *R. v. Hardy* (1794), 24 St. Tr. 199, 1379; *R. v. Hensey* (1758), 19 St. Tr. 1341; Stephen, *History of the Criminal Law*, ii. 266 ff.

<sup>3</sup> *Dammaree's Case*, 15 St. Tr. 521.

strain the definition of treason in order to punish disorder which had no political end in view. But the law of treason took no cognizance of offences against the State which could not be construed to be also offences against the person or personal authority of the King. It was not until 1795<sup>1</sup> that statutory force was given to the extended interpretations of the Act of Edward III, and an actual or contemplated forcible attempt to make the King change his counsels, or to intimidate both Houses or either House of Parliament was made treason. This Act was made perpetual in 1817.<sup>2</sup> In 1848 all the acts, or compassings mentioned therein, which did not tend to the death, personal injury, or personal restraint of the Sovereign, were made treason-felony, and so not necessarily punishable with death.<sup>3</sup> The treasons of 25 Ed. III still remain treasons on the Statute book.

Treason, therefore, as distinct from treason-felony, is the doing or designing anything which would lead to the death, bodily harm, or restraint of the King, levying war against him, adhering to his enemies within or without the realm,<sup>4</sup> or otherwise doing acts which fall under the Statute of Edward III.

Conspiracies to levy war, to deprive the King of the Crown or of any part of his dominions, or to incite foreigners to invade the realm, are treason-felony, and may perhaps be dealt with as constructive treason.<sup>5</sup> Force contemplated or applied to make the King change his counsels, or to intimidate either House or both Houses of Parliament is treason-felony.<sup>6</sup> Thus conspiracies of the Fenian Brotherhood to use force to separate Ireland from the Crown were treason-felony.<sup>7</sup> In the case of conspiracy as of treason there are no accessories, but all are principals.<sup>8</sup>

The law of treason was in one or two respects mitigated by early legislation<sup>9</sup> requiring that there should be two witnesses

<sup>1</sup> 36 Geo. III, c. 7.

<sup>2</sup> 57 Geo. III, c. 6.

<sup>3</sup> 11 & 12 Vict. c. 12.

<sup>4</sup> *R. v. Lynch*, [1903] 1 K.B. 444; *R. v. Casement*, [1917] 1 K.B. 98.

<sup>5</sup> Stephen, op. cit. ii. 286.

<sup>6</sup> 11 & 12 Vict. c. 12, s. 3.

<sup>7</sup> *R. v. Gallagher* (1883), 15 Cox C.C. 291; cf. *R. v. Deasy*, ibid. 334; *R. v. Davitt* (1870), 11 Cox C.C. 676; *Mulcahy v. R.* (1866), I.R. 1 C.L. 12.

<sup>8</sup> *R. v. Meaney* (1867), I.R. 1 C.L. 500, 553, 554.

<sup>9</sup> 7 & 8 Will. III, c. 3. The rule was older, if less explicit (5 & 6 Ed VI, c. 11) and had been accepted at the trial of the regicides (1660) and of Lord Stafford (1680).

to each overt act or one to each of two overt acts of the same treason ; that the accused should be entitled to be defended throughout the trial by counsel, have powers to secure the presence of his witnesses, and have them examined on oath, and that he should be able to challenge up to thirty-five jurors. A later Act<sup>1</sup> secured his receiving ten days before trial the indictment, a list of Crown witnesses and the panel of jurors. Of far greater value, of course, has been the changed outlook of the Courts and the fairness now demanded of prosecuting counsel. Forfeiture and corruption of blood for treason disappeared in 1870.<sup>2</sup>

### § 3. THE RIGHT TO PERSONAL LIBERTY AND THE RULE OF LAW

The Constitution of the Irish Free State<sup>3</sup> alone among constitutions of the British Empire provides formally a list of rights of the subject, which includes the (1) liberty of the subject ; (2) the inviolability of the dwelling of each citizen ; (3) freedom of conscience and the free profession and practice of religion, subject to public order and morality ; (4) the right of free expression of opinion ; (5) the right to assemble peaceably and without arms ; (6) the right to form associations or unions ; and the (7) right of every citizen to free elementary education. This enunciation of principles is, as often in the case of this constitution, merely the translation into constitutional articles of rules which prevail in England as the result of the operation of the ordinary law. The English rule of law, as expounded by Dicey,<sup>4</sup> includes three things : (1) the absence of arbitrary power on the part of the Government ; (2) the subjection of every man, whatever his rank or position, to the ordinary law of the land and his amenability to the jurisdiction of the ordinary tribunals ; and (3) the derivation of constitutional rights from the decisions of the Courts on individual cases brought before them, and the application by the Courts of the rules of private law to the Crown and its officers.

The characteristics of the Constitution enunciated by

<sup>1</sup> 7 Anne, c. 21.

<sup>2</sup> 33 & 34 Vict. c. 23.

<sup>3</sup> Articles 6–10.

<sup>4</sup> *Law of the Constitution*, ch. iv.

Dicey have often been criticized, and it is true that in some measure, as he himself recognized,<sup>1</sup> the trend of legislation has weakened their force. But there is still noteworthy the reluctance to allow arbitrary interference with personal liberty,<sup>2</sup> or with the due course of judicial procedure.<sup>3</sup> It is true that, strictly speaking, it may be claimed that, if the executive is given arbitrary discretion to imprison by a law, action under that power is still consonant with the rule of law. But it is emphatically contrary to the spirit of English law that the executive should have such powers, as is shown by the fact that even in stress of war dissent was expressed by Lord Shaw as to the validity of a statutory regulation giving the power to imprison a naturalized alien as a person of hostile origin and association.<sup>4</sup> Moreover, so strongly is liberty favoured that even an alien engaged in war time in hostile activities against the Crown in Ireland is entitled to the protection of his liberty as fully as a British subject.<sup>5</sup> Still more significant is the case of Art O'Brien,<sup>6</sup> who was sent to the Irish Free State under a regulation under the Restoration of Order in Ireland Act, 1920, on the score of his hostile activities against the Irish Free State, but set free on application to the English Courts, on the ground that the regulation was in effect repealed by the Irish Free State Constitution Act, 1922.

It is true also that the Crown and its servants are by no means wholly assimilated to private persons in matters of rights or liabilities, as will be seen later, and especially of late very extensive authority to determine matters affecting private rights as to unemployment insurance, old age and widows' pensions, housing, education, marketing of agricul-

<sup>1</sup> Op. cit. (ed. 1915), pp. xxxviii–xlvi.

<sup>2</sup> Thus a County Council in 1934 had to pay £750 to secure the dropping of an action for false arrest and imprisonment raised by a lady who was mistakenly seized by its officers in error for an insane person, and the Home Secretary expressed the deep concern of the Government and House of Commons at the error.

<sup>3</sup> Thus in April 1934 the Home Secretary expressed deep regret for an erroneous interference by the Secretary, Scotland Yard, with the due course of judicial proceedings. In 1924 the Government was defeated because of alleged interference with a prosecution of a Communist.

<sup>4</sup> *R. v. Halliday; Zadig, Ex parte*, [1917] A.C. 260.

<sup>5</sup> *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

<sup>6</sup> *R. v. Secretary of State for Home Affairs; O'Brien, Ex parte*, [1923] 2 K.B. 361.

tural products and mining activities, railway rates, &c., has been assigned to administrative tribunals of various kinds. But these changes are in the main defensible, and do not touch normally liberty of person, though they may affect property rights deeply. Moreover, the principle still holds that any wrong inflicted on a private person by an official gives rise to the right to bring suit against the offender in the ordinary Courts, a position which has considerable value as inducing public servants to obey the law, since they cannot demand as of right reimbursement by the department in which they serve. On the other hand, it is true that greater advantage might accrue to an injured person by the right, as under the French and other systems of administrative law,<sup>1</sup> and to some extent in the British Empire, to sue the Crown in tort and to recover substantial damages.

The third aspect of the rule of law is chiefly of interest because it emphasizes the importance of the existence of effective means of enforcing the rights recognized by English law. Declarations of right in foreign constitutions are by no means always effective in operation ; even the Supreme Court of the United States has not succeeded in making operative the right of negroes to be treated on a base of equality with white persons. In English law there can normally be no right without means of making it operative through judicial action. The English Courts make good any defect in formal enunciation of constitutional principles by their jealous readiness to safeguard the rights of individuals.

The right to liberty is secured by a variety of means partly under Common Law, partly under Statute. The power to arrest is enjoyed by a private person only to a very limited extent, e.g. when a felony has been committed or a breach of the peace committed accompanied by violence in his presence police officers have much wider powers ; they can arrest on suspicion of felony, and in any case of breach of peace, and they execute warrants for arrest issued by magistrates, enjoying protection in so doing even if the warrant they carry has been issued irregularly ; but such protection is dependent

<sup>1</sup> Cf. Dicey, *Law of the Constitution*, pp. 393 ff. Specially worthy of note is the fact that French law gives redress for the unjust use of legal powers by public authorities, an idea foreign in the main to English law.

on accurate obedience to law.<sup>1</sup> Moreover, bail<sup>2</sup> is regularly required to be given whenever possible to accused persons, when committed for trial by magistrates or when appealing to Quarter Sessions, with appeal to a High Court judge if the sum demanded is too high or bail is refused. A judge may grant bail during a trial or pending appeal. In certain cases police superintendents may grant bail.

Where liberty is infringed, the law permits in limited measure the right of self-defence. A man may protect his person, house, or property against felonious attempts, and may use force to protect a relative or a weaker person from attack, or to preserve the public peace. But the right is subject to the rule that the force used must be proportionate to the need and be a necessary mode<sup>3</sup> of meeting the emergency. On the other hand, a generous interpretation is given to the right to use force to prevent the commission of crime or the escape of a felon.

Of fundamental importance is the right to claim damages for assault, false arrest, false imprisonment, or malicious prosecution; in such cases damages may be exemplary, and criminal proceedings may be taken for assault, battery or false imprisonment. But the vital means of recovering liberty is the writ of *habeas corpus*. Its history is interesting; originally it was used to secure the presence of an accused person before the Court as an ordinary part of the procedure of the thirteenth century.<sup>4</sup> In the fourteenth and fifteenth centuries it was used as ancillary to the Writ of Privilege, by which one of the superior Courts asserted control over its own officials as against other Courts. In the sixteenth century the writ is found used to protect persons from the jurisdiction of the newer prerogative Courts, and from the exercise of irregular authority by executive officers.<sup>5</sup> But the Courts admitted the right of the Privy Council and of a Secretary of

<sup>1</sup> Thus a constable may arrest under a warrant, even if he has not it with him (15 & 16 Geo. V, c. 86, s. 44), but in such a case the warrant must be strictly in order; *Horsfield v. Brown*, [1932] 1 K.B. 355.

<sup>2</sup> See, e.g., 61 & 62 Vict. c. 7; 42 & 43 Vict. c. 49, s. 38; 10 Geo. IV, c. 44.

<sup>3</sup> *Criminal Code Bill Commission, Report* (C. 2345), p. 11; *R. v. Hewlett* (1858), 1 F. & F. 91. Cf. *R. v. Hussey* (1925), 18 Cr. App. R. 160.

<sup>4</sup> Jenks, *Select Essays in Anglo-American Legal History*, ii. 531-48.

<sup>5</sup> *Search's Case* (1588), 1 Leon. 70; *Howell's Case*, *ibid.* 71.

State to commit, and only claimed the right to insist on the production of the prisoners before the judges, who, however, would only remand them if satisfied of the authority by which the accused were committed.<sup>1</sup> The defects of this position were made clear in the *Five Knights' Case*<sup>2</sup> in 1627, when the applicants had to be remanded to the Fleet Prison; the Petition of Right, 1628,<sup>3</sup> failed to prevent the Court refusing to order the production of the accused in the *Six Members' Case*<sup>4</sup> in 1629. The Long Parliament ineffectively tried to remedy the defect, but the difficulties shown to exist in *Jenks's (Jenkes's) Case*<sup>5</sup> evoked the Habeas Corpus Act, 1679, which deals with persons confined on criminal charges. The effect of the Act is that, on application to any judge of the High Court—successive applications being legitimate<sup>6</sup>—on reasonable cause being shown, the gaoler, in whose control the prisoner is, or an officer who can control<sup>7</sup> the gaoler, is required to explain the cause of detention. If this proves to be inadequate, the prisoner will be discharged; if the cause of detention is a mere misdemeanour, he will normally be admitted to bail; if the cause is felony or treason, the prisoner will remain in custody. But the Act secures that he must normally be tried at the first sessions after committal, or, if not then tried, be bailed, unless the Crown witnesses cannot appear. If not tried at the second sessions, he is entitled to discharge. The act imposes a penalty of £500 on a judge who refuses an application for the writ, and prevents the removal of prisoners overseas to evade the effect of the writ.

The value of the writ to determine the illegality of executive action has often been proved. It forms an essential part of the apparatus for testing the validity of extradition proceedings. Under the procedure a person whose extradition is applied for is on a *prima-facie* case committed by a magistrate for extradition, but may apply on *habeas corpus* proceedings for consideration of the legality of the claim under the treaty, e.g. whether the crime is a political one for which

<sup>1</sup> Judges' resolution (1592), 1 Anderson's Rep. 298.

<sup>2</sup> 3 St. Tr. 1.

<sup>3</sup> 3 Car. I, c. 1, s. 5.

<sup>4</sup> 3 St. Tr. 235.

<sup>5</sup> (1676), 6 St. Tr. 1189.

<sup>6</sup> *Eshugbayi (Eleko) v. Government of Nigeria*, [1928] A.C. 459.

<sup>7</sup> *R. v. Secretary of State for Home Affairs; O'Brien, Ex parte*, [1923] 2 K.B. 361.

extradition is forbidden,<sup>1</sup> or is committed by a person himself on British territory but through an agent in a foreign country.<sup>2</sup> The Court will also decide as to the legality of the detention in England of persons in transit through the country in custody.<sup>3</sup> Persons sent to England under the Fugitive Offenders Act, 1881, can likewise question the validity of their detention in England.<sup>4</sup>

The writ applies also under the Habeas Corpus Act, 1816, to detention not under colour of criminal charges, reinforcing the common law. Thus it has been held that slavery is impossible in England,<sup>5</sup> that a husband no longer can confine his wife at his discretion,<sup>6</sup> and that a child cannot without sufficient cause be withheld from a parent.<sup>7</sup> A lunatic may thus regain liberty if improperly detained; for such detention an action for damages lies.<sup>8</sup> On the other hand, the impressment of sailors in war has been ruled legal.<sup>9</sup>

The writ runs into the Channel Islands, the Isle of Man, and originally into the colonies. But by Statute, passed as the outcome of the issue of the writ to Canada, it cannot be issued to any colony or foreign dominion of the Crown where exists a Court competent to issue such a writ.<sup>10</sup> But this does not prevent the issue of the writ to the Secretary of State for the Colonies in respect of the detention in a British protectorate of a native chief under a local Ordinance.<sup>11</sup>

In time of stress the issue of the writ may in effect be suspended by Statute, but in such a case an Act of Indemnity normally is deemed necessary in order to remove any doubt as to the legality of action taken by officials or others during the period when the writ was suspended.<sup>12</sup> Analogous in effect was the use of the Defence of the Realm Act, 1914, to justify

<sup>1</sup> Cf. *Castioni*, *In re*, [1891] 1 Q.B. 149; *Meunier*, *In re*, [1894] 2 Q.B. 415.

<sup>2</sup> Cf. *R. v. Nillins* (1884), 53 L.J. M.C. 157; *R. v. Godfrey*, [1923] 1 K.B. 24.

<sup>3</sup> *The Canadian Prisoners' Case* (1839), 3 St. Tr. (N.S.) 363.

<sup>4</sup> Cf. *R. v. Allen* (1860), 30 L.J. Q.B. 38.

<sup>5</sup> *Somerset's Case* (1772), 20 St. Tr. 1.

<sup>6</sup> *R. v. Jackson*, [1891] 1 Q.B. 671.

<sup>7</sup> *R. v. Barnardo; Jones's Case*, [1891] A.C. 388.

<sup>8</sup> *Harnett v. Fisher*, [1927] A.C. 574.

<sup>9</sup> *Case of Pressing Mariners*, 18 St. Tr. 1323.

<sup>10</sup> 25 & 26 Vict. c. 20.

<sup>11</sup> *R. v. Crewe; Sekgome, Ex parte*, [1910] 2 K.B. 576.

<sup>12</sup> e.g. 34 Geo. III, c. 54; 41 Geo. III, c. 61.

the detention of certain persons suspected of hostile connexions, even if of British nationality.<sup>1</sup> In this case also an Indemnity Act of 1920 was enacted, though its main purpose was to validate other forms of illegal action taken under stress of war conditions. This Act was of the widest scope, and made clear the legality of governmental acts in general even if done outside the Empire.

In certain cases, of course, detention is legally justified not only in respect of crime, but also of lunacy, or Military, Naval, or Air Force custody. Parents have a certain power to restrain the movements of their children; persons may be detained in isolation hospitals for infectious diseases; children in schools, and reasonable chastisement in their case is possible. Of greater importance is the right of the Crown to detain enemy aliens found in the country, even if peacefully resident therein at the outset of war.<sup>2</sup>

In Scotland, to which the Habeas Corpus Acts do not apply, a measure of protection to accused persons was provided by an Act of 1701 (c. 6) which forbade imprisonment except under a written warrant by a magistrate and gave the right to the release of the prisoner on bail in all except capital cases. Prolonged detention without trial was rendered difficult by giving the prisoner the right to demand trial; if it were not completed within a specified period release must be allowed. Under modern legislation<sup>3</sup> bail may be granted by a magistrate in all cases save treason and murder, subject to appeal to the Justiciary Court; in murder or treason the Lord Advocate or the Justiciary Court may grant bail. The utmost limit of detention without trial is 110 days, unless the trial cannot be concluded by reason of the illness of the accused, judge, or juror, or the illness or absence of a witness or some other sufficient cause in the discretion of the Court.<sup>4</sup> It is contrary to practice to delay trials save for unavoidable causes. Wrongous imprisonment is criminal under the Act of 1701 and civil proceedings lie in respect of it. But the fact that criminal prosecutions take place at the initiative of the

<sup>1</sup> *Zadig, Ex parte*, [1917] A.C. 260; *Howsin, Ex parte* (1917), 33 T.L.R. 527.

<sup>2</sup> *R. v. Vine Street Police Station Superintendent; Liebmann, Ex parte*, [1916] 1 K.B. 268.

<sup>3</sup> Criminal Procedure (Scotland) Act, 1887; Bail (Scotland) Act, 1888.

<sup>4</sup> *H.M. Advocate v. Bickerstaff*, 1926 J.C. 65.

public prosecutor renders abuse of legal process rare.<sup>1</sup> In extradition and fugitive offender procedure provision is made for similar protection as is afforded by *habeas corpus*.

A further safety for liberty in England is secured by the decision of the Courts against the validity of general warrants issued by a Secretary of State to search for the author or printer of a publication;<sup>2</sup> a like rule applies to the issue of a general warrant to search for papers on which to found a charge of sedition or blasphemy,<sup>3</sup> and there are limits, vaguely defined, to the search for and seizure and detention of papers in case of arrest of persons charged with such crimes.<sup>4</sup> The strength of feeling in favour of liberty was seen in 1934 when the Incitement to Disaffection Act was drastically modified in its passage through the House of Commons in order to minimize risk of interference with private rights.

#### § 4. THE RIGHT TO FREEDOM OF DISCUSSION

The right to freedom of speech or writing is barely recognized in English law, and despite many legislative changes the restrictions on expression of views are not negligible. The freedom, such as it is, merely means that a man may say or write whatever he pleases subject to the operation of the law of the land which penalizes slander and libel, sedition, blasphemy, and indecency. Virtually this places the control of the standard in the hands of juries, with advantages no doubt, but also subjecting the writer to the risk of the prejudices of the average man or woman who may resent advanced ideas.

Slander or libel of an individual is committed if one is held up to contempt, ridicule or hatred, or is exposed to injury in business, trade, or profession. But slander is normally not criminal, allowing only of civil action; exceptions are verbal abuse of members of either House of Parliament, of either House, and of High Court judges. Libel is both criminal and tortious; there is the distinction that truth is a complete

<sup>1</sup> For protection of officers see 8 Ed. VII, c. 65, s. 59.

<sup>2</sup> *Leach v. Money* (1765), 19 St. Tr. 1001.

<sup>3</sup> *Wilkes v. Wood* (1763), 19 St. Tr. 1153; *Entick v. Carrington* (1765), ibid. 1030. See p. 305, n. 5, *post*.

<sup>4</sup> *Elias v. Pasmore*, [1934] 2 K.B. 164. The case raises more points than it solves.

answer to a civil action; but a criminal charge requires for answer truth and proof that it was for the public interest that it should be published; moreover publication to the person libelled suffices in a criminal charge.<sup>1</sup> In recent cases of civil proceedings publication of libellous matters merely in course of business to clerks has not been held to constitute technically publication.<sup>2</sup>

There are, however, certain exceptions to the rules as to libel. Statements in Parliaments, however untrue and unfair, are not open to impeachment.<sup>3</sup> Reports and other matter published by order of either House of Parliament are absolutely privileged by Statute.<sup>4</sup> Judicial proceedings are in like case; counsel cannot be sued for defamation, even if actuated by personal malice, though he can in a proper case be committed for contempt of court.<sup>5</sup> Witnesses and parties are in like case. Moreover, fair and accurate reports of judicial proceedings, made contemporaneously, are privileged, subject to the rule of the Judicial Proceedings (Regulation of Reports) Act, 1926, that indecent medical details shall not be published, and that in divorce proceedings there shall be published only the names of the parties, a summary of the charges, the legal argument, and the summing-up. It has been decided that the proceedings at a court-martial are privileged,<sup>6</sup> and this may be true also of communications between governmental officers of a military<sup>7</sup> or civil character,<sup>8</sup> but this issue may perhaps be reopened.

Other publications are given a less wide privilege, which is destroyed by proof of actual malice. Such are communications made under a moral or legal duty or between persons with a common interest,<sup>9</sup> or in self-defence.<sup>10</sup> Fair and accurate

<sup>1</sup> *R. v. Adams* (1889), 22 Q.B.D. 66.

<sup>2</sup> *Osborn v. Boulter & Son*, [1930] 2 K.B. 226.

<sup>3</sup> *R. v. Creevey* (1813), 1 M. & S. 273; *R. v. Lord Abingdon* (1794), 1 Esp. 226.

<sup>4</sup> 3 & 4 Vict. c. 9. Cf. *Mangena v. Wright*, [1909] 2 K.B. 958; *Mangena v. Lloyd* (1908), 99 L.T. 824.

<sup>5</sup> *Munster v. Lamb* (1883), 11 Q.B. D. 588; *Pater, Ex parte* (1864), 5 B. & S. 299. <sup>6</sup> *Dawkins v. Lord Rokeby* (1875), L.R. 7 H.L. 744.

<sup>7</sup> *Ibid.* <sup>8</sup> *Isaacs & Sons v. Cook*, [1925] 2 K.B. 391.

<sup>9</sup> *Stuart v. Bell*, [1891] 1 Q.B. 530; *Watt v. Longsdon*, [1930] 1 K.B. 130; *Chapman v. Ellesmere*, [1932] 2 K.B. 431.

<sup>10</sup> *Koenig v. Ritchie* (1862), 3 F. & F. 413.

reports of Parliamentary proceedings, of public meetings, of town council and other meetings of like character,<sup>1</sup> summaries of Parliamentary publications, enjoy qualified privilege. Solicitors and their clients enjoy a very wide immunity in respect of communications in contemplation or during the course of legal proceedings.<sup>2</sup> Distinct from privilege is the defence of fair comment on matters of public interest; it is fatal to such a defence if the facts which form the basis of the criticism are misstated, and the criticism must be fair, and not degenerate into personal abuse.<sup>3</sup>

Of even greater importance is the law regarding sedition, including seditious libel. The control of the Press commenced on the invention of printing; it was recognized as part of the prerogative, and under the Tudor and early Stuart régime a censorship was exercised under orders of the Privy Council, enforced by the Star Chamber. This form of regulation was removed by the action of the Long Parliament in abolishing the judicial powers of the Council, but it imposed restrictions, though this period saw the development of a literature of polemical tracts. From 1662 to 1693 with a break in 1679–85, licensing was enforced by legislation. The Common Law as interpreted by Scroggs C.J. in 1680<sup>4</sup> was held to forbid any discussion of the Government, whether in praise or censure, and, though this extreme doctrine did not prevail, the Press was subject to control, in part by the imposition of increasingly heavy stamp duties, in part by the interpretation of the province of judge and jury. The judicial view arrogated to the Court the sole right to decide the criminality of a libel, leaving to the jury only the duty of deciding the fact of publication and the correctness of the interpretation placed by the prosecution on the terms attacked. Further, it was ruled in *Almon's Case*<sup>5</sup> that publication of a libel involved guilt on the master of the servant actually responsible for the issue. But juries were sometimes induced to return a verdict of 'guilty of printing and publishing only', as in the case of *Woodfall*,<sup>6</sup>

<sup>1</sup> 51 & 52 Vict. c. 64, s. 4. Comments on proceedings are not privileged: *Standen v. South Essex Recorders* (1934), 50 T.L.R. 365.

<sup>2</sup> *More v. Weaver*, [1928] 2 K.B. 520; *Minter v. Priest*, [1930] A.C. 558.

<sup>3</sup> *Burton v. Board*, [1929] 1 K.B. 301.

<sup>4</sup> *Cases of Harris and Carr*, 7 St. Tr. 929, 1127.

<sup>5</sup> (1770), 20 St. Tr. 803.

<sup>6</sup> (1770), 20 St. Tr. 895.

the publisher of Junius's Letter to the King in the *Morning Advertiser*, 19 December 1769, or even of 'not guilty' as in that of Miller<sup>1</sup> and the other printers. Erskine's famous defence of liberty of criticism<sup>2</sup> in the cases of the Dean of St. Asaph in 1783, and of Stockdale<sup>3</sup> in 1789 for his criticism of Parliament's treatment of Warren Hastings was followed by Fox's Libel Act, 1792,<sup>4</sup> which allowed the jury to return a general verdict of guilty or not guilty. Earlier the Courts had condemned general warrants for the search for alleged libellous documents.<sup>5</sup> But the period of repression during the Napoleonic Wars resulted in 1819 in the Blasphemous and Seditious Libels Act, which permits the Court on conviction of any person on account of such a libel to order the seizure of any copies of the libel in his possession or that of any named person; it permitted banishment for a second offence, but this provision was repealed in 1830. Moreover, the advertisement duty was reduced in 1833 and dropped in 1853; that on newspapers fell to 1d. in 1836 and was given up in 1855, while the duty on paper was removed in 1861. Lord Campbell's Act, 1843, made truth and public interest, as above noted, a defence to a criminal charge, and enabled a publisher to escape liability by showing that a servant had published without his authority or knowledge, and that his ignorance was not culpable. Provision is made by an Act of 1881 for the summary trial of journalists charged with minor cases of criminal libel and allows fines up to £50.

Further concessions have been made to newspapers. Thus the Law of Libel Amendment Act, 1888, provides for the right of the defendant in a civil action to plead in mitigation of damages the receipt by the plaintiff of moneys from other sources. Moreover, it is possible to plead apology, to allege that there has been no negligence or malice, and to pay money as amends into Court. Security that the plaintiff may have the means of ascertaining by whom he has been libelled is provided as far as possible by the requirement that printed works intended for distribution shall bear the name and

<sup>1</sup> (1770), 20 St. Tr. 870.

<sup>2</sup> Cf. Stephen, *H.C.L.* ii. 333 ff.

<sup>3</sup> 22 St. Tr. 237.

<sup>4</sup> 32 Geo. III, c. 62.

<sup>5</sup> *Leach v. Money* (1765), 19 St. Tr. 1001. In *Entick v. Carrington*, *ibid.* 1030, the warrant was to seize libels by a named author, but this also was ruled illegal.

address of the printer,<sup>1</sup> and that the names of newspaper proprietors must be registered.<sup>2</sup>

Whether in words or in written form sedition has a very wide ambit. It covers any attempt to bring into hatred and contempt the Crown, the Houses of Parliament, the Constitution, to raise discontent among the people or promote hostility between the various classes of the people.<sup>3</sup> Nothing but moderation on the part of the Government and public feeling in favour of liberty prevents charges of sedition being freely used to check the expression of views hostile to the Government. The law in practice is exerted chiefly against efforts of Communists to instigate actual revolt. It may be added that it is an offence under the Incitement to Mutiny Act, 1797, to attempt to incite troops to mutiny; that it is a crime to endeavour to seduce any member of His Majesty's forces from his duty or allegiance;<sup>4</sup> and it is illegal to seek to cause disaffection among the members of the police force, under the Police Act, 1919. There is adequate power therefore under the Common and Statute Law, apart from the Emergency Powers Act, 1920, for the control of opinion; under that Act the Government could at once on declaration of a state of emergency establish an effective control of the Press, and use the broadcasting system for the dissemination solely of its own views on questions agitating the public mind.

In the case of blasphemy also the extent of the offence in law is so wide that expression of views could be drastically limited. It is still in theory true that the denial of the truth of Christianity or the authority of the Scriptures by a person educated in Christianity in England is a criminal offence.<sup>5</sup> In

<sup>1</sup> 44 & 45 Vict. c. 60, s. 9.

<sup>2</sup> 32 & 33 Vict. c. 24.

<sup>3</sup> 60 Geo. III and 1 Geo. IV, c. 8, s. 1; Stephen, *Digest of Crim. Law*, Art. 93; *R. v. Burns* (1886), 16 Cox C.C. 355; *R. v. Aldred* (1909), 22 Cox C.C. 1.

<sup>4</sup> See the Incitement to Disaffection Act, 1934, which permits in certain cases the issue of search warrants for literature intended to incite members of the armed forces to disaffection. As safeguards for liberty there were inserted in the Act the requirements (1) that warrants should be issued by High Court judges in England, Sheriffs in Scotland, and (2) that in England the Director of Public Prosecutions must sanction prosecutions; in Scotland prosecutions are, under the common law, official, and are conducted by the Public Prosecutor, i.e. by or on behalf of the Lord Advocate.

<sup>5</sup> 9 & 10 Will. III, c. 35; 53 Geo. III, c. 160; cf. Stephen, *Digest*, Art. 181.

any case it appears that any person is guilty of publishing a blasphemous libel who publishes matters relating to God, Jesus Christ, or the Bible or Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the Church, or to promote immorality.<sup>1</sup> But it is legal<sup>2</sup> soberly to discuss and even to negative the truth of Christianity and its doctrines. Indecency covers the writing, making, and publication of books, pictures, &c., if the writing, picture, or other matter has a tendency to corrupt the minds of such persons as are open to immoral influences ; it is immaterial that the motives of those concerned are pure. It is a crime to exhibit for sale or otherwise indecent prints, books, &c., and the circumstances of the exhibition may affect its character.<sup>3</sup> It is a misdemeanour to send by post indecent matter,<sup>4</sup> and the Postmaster-General may stop the transit of such matter.<sup>5</sup> The exhibition of indecent advertisements is likewise criminal.<sup>6</sup> Special powers are given to a Court of petty sessions, if satisfied on complaint that obscene matter is being kept in any place for sale, to grant a search warrant for the seizure of the papers ; a summons can then be issued to the occupier to show cause why the articles should not be destroyed.<sup>7</sup>

Protection to the public against the breach of public order or morals in theatres is to a limited extent provided, formerly by the prerogative, and now by the Theatres Act, 1843. The jurisdiction of the Lord Chamberlain extends to forbid the performance of unlicensed stage plays at any theatre in Great Britain ; he can also at discretion forbid any public performance of a play if he deems performance contrary to decorum, good manners, and public peace. All old plays if altered and new plays must be submitted to be read by his examiner, who can secure such changes as are needed. The Lord Chamberlain is also the licensing authority in the cities

<sup>1</sup> Cf. Stephen, Arts. 179-83. See also *Att. Gen. v. Bradlaugh* (1884), 14 Q.B. D. 667, 719, *per* Lindley L.J.

<sup>2</sup> Cf. *R. v. Ramsay and Foote* (1883), 48 L.T. 733; *Bowman v. Secular Society*, [1917] A.C. 406.

<sup>3</sup> *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, 371. Cf. *R. v. Bradlaugh and Besant* (1878), 3 Q.B. D. 569.

<sup>4</sup> 47 & 48 Vict. c. 76; 8 Ed. VII, c. 48.

<sup>5</sup> 33 & 34 Vict. c. 79; 8 Ed. VII, c. 48.

<sup>6</sup> 52 & 53 Vict. c. 18.

<sup>7</sup> 20 & 21 Vict. c. 83, s. 1.

of London and Westminster, in Finsbury, Marylebone, Tower Hamlets, and in places such as Windsor where the King has a royal residence. The authority in the counties is the County Council, and the Universities of Oxford and Cambridge can veto the performance of plays in their area of jurisdiction.

### § 5. THE RIGHT OF PUBLIC MEETING

No specific right of public meeting is recognized in English law. So far as it exists it merely follows as a deduction from the rule that any person may meet and talk with others so long as he does not invade the property of others, or create an obstruction on the public highway, which is intended primarily for a means of transit,<sup>1</sup> or ignore such rules as may exist limiting public meetings in public parks.<sup>2</sup> Moreover, the purpose of the meeting and the mode of conducting it must be legal; the public must be protected from nuisance, and breach of the peace and tumult. A riot<sup>3</sup> is constituted if three or more persons assemble with a common purpose (however lawful) with the intention to aid one another against any opponents to their execution of their end, and in executing their end display force or violence so as to alarm at least one person of reasonable firmness; a rout<sup>4</sup> arises when persons so assembled make a motion to execute their purposes. Damage by rioters gives rise to the right of redress from the police fund of the appropriate authority.<sup>5</sup> The dispersion of rioters is thus of great importance. The Riot Act<sup>6</sup> therefore authorizes a special procedure to secure this result. If twelve or more persons riotously assembled are commanded by a magistrate, sheriff, mayor, or justice by a proclamation under the Act to disperse, and they remain together for an hour thereafter, they are guilty of felony, and may be forcibly dispersed even if in doing so

<sup>1</sup> *R. v. Graham* (1888), 16 Cox C.C. 420; *Lewis, Ex parte* (1888), 21 Q.B. D. 191.

<sup>2</sup> See, e.g., 35 & 36 Vict. c. 15 as to parks and gardens; powers to regulate are given to borough and county councils by the Municipal Corporations Act, 1882, and the Local Government Act, 1888.

<sup>3</sup> *Field v. Receiver of Metropolitan Police*, [1907] 2 K.B. 853.

<sup>4</sup> *Hawkins, Pleas of the Crown*, c. 65, s. 8.

<sup>5</sup> 49 & 50 Vict. c. 38; *Ford v. Receiver, &c.*, [1921] 2 K.B. 344; *Pitchers v. Surrey County Council*, [1923] 2 K.B. 415.

<sup>6</sup> 1 Geo. I, st. 1, c. 5.

death or injury be inflicted. Armed opposition to the reading of the proclamation is felony. The military may be used for the dispersion of rioters,<sup>1</sup> for they,<sup>2</sup> magistrates,<sup>3</sup> police,<sup>4</sup> and other subjects on the demand of the police,<sup>5</sup> are bound to keep order.

Severe penalties are imposed on persons administering oaths binding persons to sedition and mutiny,<sup>6</sup> and on military drilling<sup>7</sup> without authority from the King, lord lieutenants, or two county or borough justices; under the Public Meeting Act, 1908, a fine of £5 or one month's imprisonment may be imposed for disorderly conduct at a public meeting; if the meeting is a political election, an infraction is a corrupt practice under the Corrupt Practices Act, 1883. There are still on the Statute book Acts forbidding tumultuous petitioning, and the convention of over fifty persons for political purposes within a mile of Westminster Hall when Parliament or the Courts of Law are sitting.<sup>8</sup> Moreover, if any meeting becomes disorderly, the police may legitimately order it to disperse simply on the ground that it constitutes a public nuisance; if their order is disobeyed, they can enforce obedience.<sup>9</sup> In order to prevent riotous assemblies and tumultuous petitions, any person may be required by a magistrate to give securities for good behaviour, and if he fails to do so may be committed to prison.<sup>10</sup>

Difficulty also arises where the end of those assembling and their methods are alike legal in themselves, but malicious persons gather to oppose them. It has been held that magistrates cannot legally forbid the holding of a meeting of the Salvation Army at Weston-super-Mare simply because a Skeleton Army threatens opposition and disorder.<sup>11</sup> But it is

<sup>1</sup> The King insisted on their acting in 1780 in the Gordon Riots after enormous damage had been caused during their inaction in the absence of magistrates to give orders.

<sup>2</sup> *Miller v. Knox* (1838), 4 Bing. (N.C.) 574.

<sup>3</sup> *R. v. Pinney* (1832), 3 B. & Ad. 947.

<sup>4</sup> *Miller v. Knox*, u.s.

<sup>5</sup> *R. v. Brown* (1841), C. & Mar. 314.

<sup>6</sup> 37 Geo. III, c. 123.

<sup>7</sup> 60 Geo. III, and 1 Geo. IV, c. 1, s. 1.

<sup>8</sup> 57 Geo. III, c. 19, and 13 Car. II, st. 1, c. 5.

<sup>9</sup> Cf. *O'Kelly v. Harvey* (1883), 15 Cox C.C. 435.

<sup>10</sup> 34 Ed. III, c. 1. So in 1933 T. Mann was committed in connexion with the march of 'hunger marchers' on London and Parliament.

<sup>11</sup> *Beatty v. Gillbanks* (1882), 9 Q.B. D. 308.

illegal to carry on Protestant propaganda in Liverpool with insulting criticism of Roman Catholic tenets and practices with the result of exciting grave disorder, and a magistrate may justly<sup>1</sup> bind over the propagandist to keep the peace. Nor is it illegal for a constable to take away an emblem from a person acting peacefully if only thus in his view can he prevent rioting,<sup>2</sup> and, though attacks on a meeting be unlawful, yet the meeting may lawfully be ordered to disperse if this is the only way to secure peace, although, of course, it is proper and desirable that the attackers should be arrested and the meeting left free to proceed.<sup>3</sup> But the fact remains that the law so accentuates the necessity for preservation of peace that liberty of meeting is liable to grave interference. Moreover, it is plain that it is impossible for a member of a meeting which is being dispersed by the police to resist them without running the risk of committing an offence.<sup>4</sup> Further, any assembly is unlawful if three or more persons (1) assemble to commit, or when assembled do commit, a breach of the peace, or (2) assemble with intent to commit a crime by open force, or (3) assemble for any common purpose, even if lawful, in such a manner as to give courageous people in the vicinity reason to fear a breach of the peace.<sup>5</sup>

#### § 6. THE RIGHT OF ASSOCIATION

The earlier system of careful governmental control of the relations of workers and masters, which developed at the end of the eighteenth century into the laws against combinations in the form of trade unions, was modified in 1824–5,<sup>6</sup> but provision was made to penalize acts of force in securing the ends of such combinations. Moreover, in 1851,<sup>7</sup> it was ruled that a combination of workers to enforce wage claims by persuading workers to leave the employer's service was criminal; and this provision appears in the Offences against the Person Act, 1861. But in 1871<sup>8</sup> Gladstone's Government enacted the

<sup>1</sup> *Wise v. Dunning*, [1902] 1 K.B. 167.

<sup>2</sup> *Humphries v. Connor* (1864), 17 Ir. C.L.R. 1.

<sup>3</sup> *R. v. Justices of Londonderry* (1891), 28 L.R. Ir. 440, 450, *per* O'Brien J.

<sup>4</sup> *R. v. Ernest Jones*, 6 St. Tr. (N.S.) 783, 811, 812, *per* Wilde C.J.

<sup>5</sup> Cf. Dicey, *Law of the Constitution*, p. 501; *R. v. Birt*, (1831) 5 C. & P. 154.

<sup>6</sup> 5 Geo. IV, c. 95, replaced by 6 Geo. IV, c. 129.

<sup>7</sup> *R. v. Rowlands*, 5 Cox C.C. 462; *R. v. Duffield*, *ibid.* 431.

<sup>8</sup> 34 & 35 Vict. c. 31.

Trade Union Act, which provided that the purposes of a trade union should not be deemed criminal because they were in restraint of trade, and authorized registered unions to vest their property in trustees and made liable to criminal proceedings persons embezzling their funds. But at the same time it forbade legal proceedings to enforce agreements entered into for the direct purpose of carrying out any of the objects of the union. This Act was reinforced by the Conspiracy and Protection of Property Act, 1875,<sup>1</sup> which cancels the old legislation making breaches of contract criminal (retaining a few necessary exceptions), and provides that an agreement to do any act shall not be an indictable conspiracy if such act committed by one person would not be a crime, unless such combination is expressly made criminal by Statute. Further, peaceful picketing was authorized.

It was, however, held in 1893<sup>2</sup> that an action for damages lay against those who induced tradesmen to break contracts,<sup>3</sup> or even not to enter into contracts.<sup>4</sup> A subsequent decision<sup>5</sup> suggested that a combination to induce third parties not to deal with, or work for, any person might be a cause of action if it caused loss to such person, though no breach of contract was involved. It was also decided in the *Taff Vale Case*<sup>6</sup> that a trade union could be sued in tort for acts of its officers on its behalf, though it was not incorporated and so not a person in the eyes of the law. Further the Courts adopted a restrictive interpretation of the right of picketing.<sup>7</sup>

The resentment caused by these decisions aided the Liberal victory of 1906, and elicited the Trade Disputes Act, 1906. It amended the definition of peaceful picketing, and rendered it invalid to bring an action against a trade union for the

<sup>1</sup> 38 & 39 Vict. c. 86.

<sup>2</sup> *Temperton v. Russell*, [1893] 1 Q.B. 715.

<sup>3</sup> This doctrine had been laid down earlier but in rather exceptional circumstances; *Lumley v. Gye* (1853), 2 E. & B. 224; *Bowen v. Hall* (1881), 6 Q.B. D. 333.

<sup>4</sup> Contrast *Mogul Steamship Co. v. McGregor*, [1892] A.C. 25, where it was held to be legitimate for shipping companies to enforce a rebate system against rivals by means similar to those of trade unions.

<sup>5</sup> *Quinn v. Leathem*, [1901] A.C. 495. The relation of this case to the *Mogul Steamship Co.'s Case* and to *Allen v. Flood*, [1898] A.C. 1 is considered in *Sorrell v. Smith*, [1925] A.C. 700, but need not here be discussed.

<sup>6</sup> [1901] A.C. 426.

<sup>7</sup> *Lycns v. Wilkins*, [1899] 1 Ch. 255; *Charnock v. Court*, [1899] 2 Ch. 35.

tortious acts of officials or members,<sup>1</sup> even if not connected with a trade dispute. It provides that an action will not lie for any act done, in contemplation or furtherance of a trade dispute, by a combination of persons which would not be actionable if done without such combination, or for any act which merely induces a breach of contract of employment or interferes with trade, business or employment, or the right of some other person to dispose of his capital. The privileged position created by the Act is obvious, though it was rendered less objectionable by the rule that a member of a union may obtain an injunction forbidding the use of the funds of the Union for unauthorized ends, e.g. political activity,<sup>2</sup> and his expulsion for refusal to subscribe to such funds. This decision was modified by legislation in 1913<sup>3</sup> to allow trade unions to establish separate political funds on condition that no persons who expressly intimated unwillingness to contribute should be penalized for their refusal. A ballot must be held before a fund is instituted.

In 1926 the occurrence of a general strike which inflicted much hardship on the people led to the passing of the Trade Disputes and Trade Unions Act, 1927. The Act declares illegal any strike which has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged, and is a strike designed or calculated to coerce the Government either directly or by inflicting hardship on the community. Workmen are deemed to be within the same trade or industry if their wages or their conditions of employment are determined by the same Joint Industrial Council, Conciliation Board or similar body. Lock-outs are equally illegal in analogous circumstances, and it is an offence to take part in any such strike or lock-out. The provisions of the Act of 1906 are not applicable, and no person refusing to take part in illegal action can be expelled from a union or penalized. Moreover, the Attorney-General may apply for an injunction to restrain the use of Union funds in support of such a strike. The political levy is confined to those who deliberately

<sup>1</sup> *Vacher v. London Society*, [1913] A.C. 107.

<sup>2</sup> *Amalgamated Society v. Osborne*, [1910] A.C. 87.

<sup>3</sup> 2 & 3 Geo. V, c. 30.

contract in, and returns of political funds of unions are required.

Civil servants may not belong to unions whose chief aim is improvement of conditions of pay or employment, unless the union is confined to servants of the Crown and is unconnected with other organizations, thus precluding the control of the government services by outside influences. Further, no local or other governmental authority can differentiate against employees on the score of membership or non-membership of a trade union.<sup>1</sup> It may be added that a local authority ought not, during a general strike, to make such a bargain with strike-makers as would make them parties to the effort of the strikers to overthrow the Government.<sup>2</sup> It is clear, of course, that, carried to extremes, such strike proceedings are constructive treason.

It has been held that it is legal for a trade association to penalize by putting on a stop list a member of the association for a violation of a price agreement, and that money paid to avert such treatment cannot be recovered as paid under duress,<sup>3</sup> but the Court of Criminal Appeal holds the exaction of money in this way criminal,<sup>4</sup> and it is not bound by the ruling of the Court of Appeal.

## § 7. THE SECURITY OF THE SUBJECT AND MARTIAL LAW

The preservation of peace is largely entrusted to local authorities, such as sheriffs, mayors of boroughs, and magistrates, but it is, of course, also an obligation of the central government, which has final responsibility and supreme power over the defence forces. The responsibility of the local officers is a heavy one; as in the Bristol riots case,<sup>5</sup> the mayor has the duty of using force, employing the military powers available, but, on the other hand, if he uses undue force he may be indicted for manslaughter or murder. On civil requisition the military or other defence forces must render aid, but it is, of course, a delusion, which cost both

<sup>1</sup> *Att. Gen. v. Birkenhead Corpns.* (1929), 93 J.P. 33.

<sup>2</sup> *Scammell and Nephew Ltd. v. Hurley*, [1929] 1 K.B. 419.

<sup>3</sup> *Hardie and Lane v. Chilton* (No. 2), [1928] 2 K.B. 306.

<sup>4</sup> *R. v. Denyer*, [1926] 2 K.B. 258.

<sup>5</sup> *R. v. Pinney* (1832), 3 St. Tr. (N.S.) 11.

lives and loss of property during the Gordon Riots in 1780, that they cannot act without the order of a magistrate. The limits and character of armed aid are defined in the report of the commission on the Featherstone Riots,<sup>1</sup> stress is laid on the necessity of proper warning of the intention to fire and proper control of the firing. The military officer in command may if necessary act as to firing on his own discretion against the advice of a civil magistrate, but he must be prepared to justify his action; he may again have, in the absence or on the refusal of a magistrate to act, to take initiative in securing order.

The Crown, in addition to Common Law powers of undefined extent, has been accorded special statutory authority to meet disorder by exercise of legislative power. On His Majesty being satisfied that interference is threatened on an extensive scale with the supply of food, fuel, light or other necessaries of life or means of locomotion, he may proclaim a state of emergency; such a proclamation may remain in operation for not more than a month, but a fresh proclamation may be issued. Parliament must be informed immediately, and if the Houses are adjourned or prorogued they must be summoned to meet within five days. While such a proclamation is in force, the King in Council may make regulations for securing the essentials of life to the community and may impose on a Secretary of State or other servants of the Crown such powers as may be deemed necessary for the preservation of peace, securing the necessities of life for the public, and the general safety. All regulations thus made must be laid before Parliament, and fall if not confirmed by a resolution passed by both Houses. Offenders against the regulations may be punished by summary jurisdictions up to a fine of £100 or imprisonment up to three months with hard labour or both. The regulations may not impose any form of compulsory military service or industrial conscription, any alteration of the rules of criminal procedure, or punishment for the peaceable persuasion of persons to join in a strike,<sup>2</sup> or taking part therein.

<sup>1</sup> *Parl. Pap.*, C. 7234.

<sup>2</sup> 10 & 11 Geo. V, c. 55. Far wider powers had in war time been exercised under the Defence of the Realm Acts, and on their expiration (31 Aug. 1921)

Apart, however, from this rather narrowly circumscribed power the Common Law power of the Crown to repress disorder and preserve peace remains, for the Act cannot reasonably be interpreted to supersede the Common Law. It is needless to consider whether the power varies in character from the power which is correlative to the normal obligation of every citizen to preserve peace;<sup>1</sup> the position of the Crown is such that the right is clearly a pre-eminent one, and thus falls under the head of prerogative. How far it extends is beyond chance of precise definition, and its discussion is inseparably bound up with the issue of martial law.

Martial law is a term of very wide effect; it is historically the law administered in the Court of the Constable and Marshal, which included the administration of the regulations enacted by the Crown to govern its forces in war; it covers the military law under the Mutiny Act and the Army Act which superseded it. It also is used for the rules enforced in enemy territory under British occupation, the sense in which it is defined by the Duke of Wellington<sup>2</sup> as being no law, and presumably covers the régime set up in an occupied district of ex-enemy territory. These cases are regulated by international law, and the rules laid down by the Crown by the prerogative, which is not restricted in regard to relations between the Crown and foreigners in foreign territory.

In the case of England the Tudors undoubtedly claimed the right to employ martial law, as then used to control their armed forces, against offenders not in arms, and the Stuarts employed it against disorderly persons as well as against offenders in their armies. The Petition of Right, 1628, negatived the legality of such action in peace in undoubted terms, leaving it arguable whether it contemplated such law as valid in case of war.<sup>3</sup> For England the issue is without authority, for no proclamation or authorization to use martial law has been resorted to since the Stuarts, even

this Act supplied the requisite substitute. A proclamation of a state of emergency was issued on 28 March 1924, but revoked 1 April. *London Gazette*, 1 April 1924. The Act was also widely used in the General Strike of 1926.

<sup>1</sup> *Miller v. Knox* (1838), 4 Bing. (N.C.) 574; *R. v. Brown* (1841), C. & Mar. 314.

<sup>2</sup> *Parl. Deb.*, 3rd Ser. cxv. 880–1.

<sup>3</sup> Contrast the charge of Blackburn J. in *R. v. Eyre* (1868), Finlason 74.

in the insurrections of 1715 and 1745, and all such powers as were necessary in 1914–18 were exercised under the Defence of the Realm Acts.

There are, however, cases of the proclamation of martial law in Ireland both in the rising of 1798 and in the insurrection against the British Government in 1916 and in 1920–1, and after the treaty of 1921 the provisional government of the Irish Free State had to resort to martial law against the opponents of the treaty. Even more famous is the use of martial law in the colonies.<sup>1</sup> Beside its abuse in British Guiana in 1823–4, there is recorded its extensive employment in Ceylon in 1848 under the incompetent régime of Lord Torrington; in Canada in 1837–8; in South Africa in 1835–6, in 1846–7, and in 1850–3; and in Jamaica in 1865, under the still more incompetent control of Governor Eyre, who had to be recalled in consequence of the public indignation excited by his misconduct.<sup>2</sup> Further, in the South African War of 1899–1902 it was put in operation in the Cape and Natal and later extended to the conquered Boer republics, and it was resorted to in Natal in 1906–8, and later in the Union of South Africa. There have been other cases, both older, and in recent times, in India. The circumstances, however, vary considerably; in the case of Ireland, for instance, though martial law was at first resorted to without legislation, it was later sanctioned by an Act of 1799 and actions done indemnified by an Act of 1801.<sup>3</sup> In the difficulties of 1920–1 the Restoration of Order in Ireland Act, 1920, was held<sup>4</sup> to authorize very drastic measures, but also to restrict the operations of the military to those provided under the Act, as constituting a statutory regulation of the prerogative. But in other cases<sup>5</sup> a much wider view was taken, perhaps more correctly. In the later struggle it was held that there were no statutory limitations.<sup>6</sup> In Ceylon there was

<sup>1</sup> Clode, *Military Forces of the Crown*, ii. 481–511.

<sup>2</sup> The attempts to excuse Eyre have been disposed of by Lord Olivier in his study (1933).

<sup>3</sup> 39 Geo. III, c. 11; 41 Geo. III, c. 104 (British). The former Act was followed in the British Act 43 Geo. III, c. 17. Cf. 3 & 4 Will. IV, c. 4.

<sup>4</sup> *Egan v. Macready*, [1921] 1 I.R. 265, *per* O'Connor M.R.

<sup>5</sup> *R. v. Allen*, [1921] 2 I.R. 241 (K.B.D.), and see note 5, p. 317 *post*.

<sup>6</sup> *R. (Childers) v. Adjutant-General of the Provisional Forces*, [1923] 1 I.R. 14.

no legislative authority to allow of the declaration of martial law, while it was fully provided for in Jamaica. In all cases the practice of passing Indemnity Acts *ex post facto* has deprived the Courts of the opportunity of declaring fully the principles applicable, and thus has left the legal issues largely unsolved. It is thus possible to argue that the Common Law right to put down rebellion extends either to all acts which may have fairly been regarded as necessary in the emergency,<sup>1</sup> or to those acts only which can be justified on the ground of immediate necessity,<sup>2</sup> or even that a military officer who suppresses a revolt cannot be subjected to control by the Courts even after the immediate emergency has passed.<sup>3</sup>

The only results that are certainly to be derived from the cases are:

(1) Civil courts ought not to interfere with the actions of military forces engaged in suppressing rebellion; that a state of war exists precluding the intervention of the Courts is not disproved by the fact that the Courts are permitted in whole or part to function during a period when martial law is proclaimed by the executive government;<sup>4</sup> (2) it is, however, for the Civil Court to decide whether or not war is raging;<sup>5</sup> (3) if it holds that it can properly intervene, it is at liberty to do so and to interfere on *habeas corpus* proceedings;<sup>6</sup> (4) on the conclusion of the operation of martial law, the Court is bound to entertain criminal and civil proceedings against those who executed martial law and to determine the validity of the acts impugned.<sup>7</sup> (5) But the acts questioned can effectively be safeguarded from question by Acts of Indemnity, though the Court will decide if the terms of the Acts are wide enough to safeguard the matters at issue.<sup>8</sup> While a tort committed in a period of martial law can be legalized in

<sup>1</sup> Sir F. Pollock, *L.Q.R.* xviii. 155 ff.

<sup>2</sup> Dicey, *Law of the Constitution*, pp. 545 ff.

<sup>3</sup> Sir H. Erle Richards, *L.Q.R.* xviii. 133 ff.

<sup>4</sup> *D. F. Marais, Ex parte*, [1902] A.C. 109. Cf. *Elphinstone v. Bedreechund* (1830), 1 Knapp 316.

<sup>5</sup> *R. v. Allen*, [1921] 2 I.R. 241; *R. (Garde) v. Strickland*, [1921] 2 I.R. 317; *R. (Ronayne) v. Strickland*, ibid. 333.

<sup>6</sup> *Wolfe Tone's Case* (1798), 27 St. Tr. 614.

<sup>7</sup> *Wright v. Fitzgerald* (1799), 27 St. Tr. 659; *Higgins v. Willis*, [1921] 2 I.R. 386. <sup>8</sup> *Wright v. Fitzgerald*, u.s.

English law by a local Act of Indemnity so as to prevent action in England,<sup>1</sup> this does not apply to criminal proceedings,<sup>2</sup> e.g. under the rule of the Offences against the Person Act, 1861, that murder overseas by a British subject can be punished in England, or the Acts imposing criminal liability on Governors of Colonies and others who commit crimes when performing official functions.

It is clear also that the declaration of martial law makes no real difference to the situation, save that it serves to warn the people of the locality where martial law is proclaimed of the intentions of the Government. Moreover, when a state of facts exists which justifies the imposition of martial law, the forces of the Crown may be employed in executing it, without any formal proclamation.<sup>3</sup> Further, the proceedings of courts martial under martial law are not legal proceedings at all; hence it is not possible to issue prohibition to such a Court, for it is not a real court at all.<sup>4</sup>

In the repression of insurrection or disorder the military in acting under the orders of their superiors are normally exempt from punishment, unless indeed the orders to act are manifestly illegal, in which case it would be impossible to excuse obedience.<sup>5</sup> There is no conclusive case,<sup>6</sup> but it may be noted that the soldiers who carried out the orders of an officer, found to be insane, for the murder of Mr. Sheehy-Skeffington during the Irish rising in 1916 were not punished for their act.<sup>7</sup> It is not clear if any civil proceedings would lie in cases where criminal proceedings would fail.

#### § 8. ACT OF STATE

In a limited number of cases the Crown has paramount powers under the prerogative in issues of foreign relations which, unlike acts under martial law, are not subject to examination in law courts. These constitute Acts of State

<sup>1</sup> *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1.

<sup>2</sup> *R. v. Nelson and Brand* (1867), F. Cockburn's Rep.; *R. v. Eyre* (1868), L.R. 3 Q.B. 487; 11 & 12 Will. III, c. 12; 42 Geo III, c. 85.

<sup>3</sup> *R. (Ronayne) v. Strickland*, [1921] 2 I.R. 333.

<sup>4</sup> *Clifford and O'Sullivan, In re*, [1921] 2 A.C. 570.

<sup>5</sup> *Keighly v. Bell* (1866), 4 F. & F. at p. 790, *per Willes J.*

<sup>6</sup> Willes's dictum is followed in *R. v. Smith* (1906), 17 Cape S.C.R. 561.

<sup>7</sup> *Parl. Pap.*, Cd. 8376.

in a technical sense, though the term often means simply actions taken by the Government. (1) The first class of such cases is that most commonly called by that name, that is, an act injuring the person or property of an alien done by authority of the Crown or ratified by the Crown, the action taking place in foreign territory or on the high seas.<sup>1</sup> (2) There is a further class of such acts when the action taken is done against an alien enemy on British territory; thus the wartime internment<sup>2</sup> of an enemy alien is not a source of *habeas corpus*, and of course the killing under royal authority of such an alien is not a ground for criminal or civil proceedings in English law, just as the act of an authorized or recognized enemy alien is not a criminal act in English law.<sup>3</sup> But even in war time a non-enemy alien, acting hostilely in British territory, cannot be made the object of an Act of State, unless possibly as a result of his hostile acts the Crown has formally withdrawn its protection.<sup>4</sup>

(3) A third set of cases arises when the British Government seizes territory as a matter of sovereign authority and when, as a consequence, injury is done to the interests of British subjects or foreigners. The British or foreign subject in such circumstances cannot sue the British Government either directly or indirectly for losses thence arising,<sup>5</sup> nor does suit lie for claims against the Government of the annexed territory.<sup>6</sup> Thus when the Transvaal and Orange River Colony were annexed, claims against those governments could not be enforced by legal proceedings,<sup>7</sup> though they were in fact generously dealt with. Nor could the Government of the Cape of Good Hope be forced to recognize the concessions made by the paramount chief Sigcau, after

<sup>1</sup> *Buron v. Denman* (1867), L.R. 2 Ex. 167 (Naval officer's aggression on possessions of foreign slave owner); contrast *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Walker v. Baird*, [1892] A.C. 491, where action was taken on British territory, and in the second case against British subjects.

<sup>2</sup> *R. v. Knockaloe Camp Commandant; Forman, Ex parte* (1917), 34 T.L.R. 4.

<sup>3</sup> Cf. *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781.

<sup>4</sup> *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

<sup>5</sup> *Ex-Rajah of Coorg v. East India Co.* (1860), 29 Beav. 300.

<sup>6</sup> *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K.B. 391.

<sup>7</sup> *Vereeniging Municipality v. Vereeniging Estates Ltd.*, [1919] T.P.D. 159; *Randjeslaagte Syndicate v. The Government*, [1908] T.S. 404; *Postmaster-General v. Taute*, [1905] T.S. 582; *Keith, State Succession*, ch. iii.

the Cape Government had annexed the territory of Pondo-land.<sup>1</sup>

On the same principle, if the British Government annexes an Indian principality, thus making its subjects British subjects, they cannot put forward claims against the Government.<sup>2</sup>

Acts of sovereign power in protectorates may possibly be justified against British subjects as Acts of State,<sup>3</sup> but this is not wholly clear.<sup>4</sup>

### § 9. THE RIGHT OF PROPERTY

It is a characteristic feature that English law from early times has been peculiarly jealous of the right of property. It afforded comparatively soon effective means of redressing intrusion whether on goods or on land by the writ of trespass in its various forms, and it was attacks on the rights of property owners that evoked the bitter resistance which ended in the execution of Charles I. The King's efforts to enforce to the full his rights under the feudal law, though legally defensible, resulted in much indignation, and brought about the abolition of feudal tenures in chivalry on the Restoration,<sup>5</sup> compensation being made to the Crown at the expense of the taxpayer in general. The same spirit was shown in the effective attacks gradually made on the practice of raising forced loans, the grant of monopolies, or the imposition of customs duties by the prerogative. The reconstruction of the East India Company in 1698–1709 was essentially brought about by the feeling excited by its trade monopoly<sup>6</sup> and its encroachments on the property of rival traders. On the other hand, the respect for property in the eighteenth century interposed a serious barrier to the necessary taking over of responsibility for Indian government, and it was perhaps

<sup>1</sup> *Cook v. Sprigg*, [1899] A.C. 572.

<sup>2</sup> *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 3 Moo. P.C. 12.

<sup>3</sup> *Sobhuza II v. Miller and the Swaziland Corporation*, [1926] A.C. 518.

<sup>4</sup> Cf. *Eshugbayi (Eleko) v. Nigerian Government*, [1931] A.C. 662, which probably does not fully cover the point but which suggests that Act of State cannot be pleaded as against a British subject in a protectorate save as provided for generally (above § 8). <sup>5</sup> 12 Car. II, c. 24.

<sup>6</sup> *East India Co. v. Sandys* (1684), 10 St. Tr. 371; Ilbert, *Government of India* (1922), pp. 24–32.

only the Sepoy Mutiny which gave sufficient strength to the critics of the Company's rule to secure its removal from its governmental functions.

The stress laid on rights of property by Locke formed an essential part of the philosophy of the revolutionary period, and no doubt led to the restoration in substantial degree of the Charter of Massachusetts and the continued existence of the small republics of Connecticut and Rhode Island, despite the menace of the institutions of these colonies to the tranquillity of British control in the course of the eighteenth century. The exaggerated severity of the punishment of Massachusetts for the Boston Tea Party<sup>1</sup> of 1773 reflects the bitterness felt at the invasion of unquestioned property rights. In the same way the abolition of slavery was long delayed by reason of the necessity of compensation for existing rights. Despite the manifest illegality of the traffic in seats in Parliament the Irish Union was accompanied by frank payment for the loss of profits to owners of seats,<sup>2</sup> and it was at one time contemplated to act similarly when the reform of the British Parliament was under discussion. Even more striking is the fact that compensation was duly paid for the excess amounts at which officers had purchased their commissions in the Army, despite the fact that the payment of more than the permitted sum was absolutely illegal.<sup>3</sup> No serious objection to this step seems to have been felt even in Liberal circles.

In the same way until very recent years the sums allowed under various Acts permitting compulsory taking of land in the public interest have always been excessive, and even now in the main public improvements often involve overpayments to persons dispossessed in the public interest. It is noteworthy that the Courts are always ready to hold that legislation must not be interpreted to give the Crown power to obtain property without full compensation,<sup>4</sup> or to allow the taking of fees for any service without clear indication by Parliament that such a right exists.<sup>5</sup> Fortunately Parlia-

<sup>1</sup> Keith, *Const. Hist. of First British Empire*, pp. 366-9.

<sup>2</sup> Cornwallis Corresp. iii. 323.

<sup>3</sup> May, *Const. Hist.* iii. 276 f.

<sup>4</sup> *Att. Gen. v. De Keyser's Royal Hotel*, [1920] A.C. 561.

<sup>5</sup> *Att. Gen. v. Wilts United Dairies* (1921), 37 T.L.R. 884. Similarly, power to determine conditions of way-leaves for electricity transmission does not

ment intervened by legislation<sup>1</sup> to remedy the wrong which otherwise would have been created, when the claim was made that levies cheerfully paid under war conditions to secure substantial advantages should be refunded on the ground that they were not properly exacted by the governmental controllers who had imposed them. There has, however, been of recent years a marked tendency in legislation affecting housing to restrict rather drastically compensation for condemned property, and the marketing schemes under the Agricultural Marketing Acts override in a striking manner private rights.

#### § 10. THE STATUS OF SUBJECTS AND ALIENS

Between various classes of British subjects there are now few distinctions. The principle of equality in the eyes of the law applies to the whole of the body of British subjects except the King. A number of privileges are allowed to governmental officers and departments as will later be seen, and, as has been noted above, trade unions have been accorded extraordinary privileges as regards liability in tort.

Women prior to 1918 enjoyed the municipal franchise and were eligible for certain local offices, but were denied all political rights proper. Equal franchise with men was accorded by the Representation of the People (Equal Franchise) Act, 1928, supplementing the limited grant of the vote at age 30 by the Representation of the People Act, 1918. Other disqualifications were swept away by the Sex Disqualification Removal Act, 1919, which opens all offices and public functions to women, admits them to juries, to any incorporated societies, including the Inns of Court, to the Civil Service, subject to regulations limiting entry in certain cases, and to the office of solicitor on conditions analogous to those affecting men. The Universities were authorized to admit women to degrees, notwithstanding any provision to the contrary in their statutes or charters. It has been ruled

cover pecuniary conditions; *West Midland Joint Electricity Authority v. Pitt*, [1932] 2 K.B. 1.

<sup>1</sup> The War Charges (Validity) Act, 1925 (15 Geo. V, c. 6).

that the Act does not avail to entitle a peeress in her own right to sit in the House of Lords.<sup>1</sup>

The status of aliens has steadily been improved since the evolution of closer commercial relations in Europe. Magna Carta (Art. 41) provided a generous code, giving aliens power to enter, dwell and depart, save in war, when they might be detained in order to secure the safety of English subjects and property in the enemy country. By Common Law they could hold neither land nor office; Henry VIII<sup>2</sup> forbade aliens renting shops or residences; they were subjected to higher taxation than subjects and not only were, and are, aliens without legal right<sup>3</sup> to enter the realm save by permission, but there formerly existed, and was exercised as late as 1575, the right of expulsion by the prerogative.<sup>4</sup> The practice, however, of admitting aliens freely when suffering from political oppression was normal; in 1793, however, suspicion of those of the French political refugees who were in touch with English democratic movements led to the passing of an Alien Act, which authorized surveillance of aliens and the removal of any suspected aliens from the country. The measure was relaxed on the peace of Amiens, reimposed on the return of war, relaxed again in 1814, and finally abolished in 1826. Restrictions, however, were reimposed in 1836,<sup>5</sup> but little used, and a temporary power given in 1848<sup>6</sup> was not put in operation. Economic conditions, however, arising from the influence of undesirable aliens led in 1905 to the passing of the Alien Immigration Act<sup>7</sup> which enables the Government to prevent the entrance of aliens who are unable to support themselves or their dependants, who are lunatics or idiots or suffering from disease and likely to become a public burden, who have been convicted of an extradition offence in a foreign country, or against whom an expulsion order has been made. Such orders may be made against aliens convicted of crime and recommended by the Court for deporta-

<sup>1</sup> *Lady Rhondda's Case*, [1922] 2 A.C. 339.

<sup>2</sup> 32 Hen. VIII, c. 16.

<sup>3</sup> *Musgrave v. Chun Teeong Toy*, [1891] A.C. 272.

<sup>4</sup> At one time the power of extradition was claimed under the prerogative (Chitty, *Criminal Law*, pp. 14, 16); it is now obsolete.

<sup>5</sup> 6 & 7 Will. IV, c. 11.

<sup>6</sup> 11 & 12 Vict. c. 20.

<sup>7</sup> 5 Ed. VII, c. 13.

tion, or who are reported by a magistrate within twelve months of their last entry to have been in receipt of parochial relief, or to have been living in insanitary conditions, or to have been sentenced in a foreign country for an extradition offence. Much wider authority was conferred by the Aliens Restriction Act, 1914, for the control in war or national emergency of the entry of aliens, their deportation,<sup>1</sup> the restriction of place of residence, their registration,<sup>2</sup> the supervision of their movements, their arrest, detention, and the search of their premises. The Aliens Restriction (Amendment) Act, 1919, continues in regular use certain powers which are exercised by Order in Council; it repeals the Act of 1905, but much of its substance is re-enacted by Order in Council under the Act of 1919. Aliens are excluded from holding pilotage certificates, or acting as master or chief officer of a merchant ship, or as skipper or second hand of a fishing-boat. An alien's change of name is subject to control, and, while an alien must serve if required on a jury after ten years' residence, he may be challenged on that ground only. The right of an alien to a jury *de medietate linguae*, a relic of the old days of the influence of the law merchant, was abolished by the Naturalization Act, 1870. While that Act<sup>3</sup> permits aliens to hold land in England, it excludes aliens from ownership of a British ship or part thereof, but this does not prevent ownership by a company duly registered as British despite the fact that all the members of the company are aliens.<sup>4</sup> An alien has, of course, no political rights or Parliamentary or local franchise, nor is he eligible for public office; but may acquire these by naturalization on fairly easy conditions, though at the absolute discretion of the Home Secretary. Aliens may, however, on certain terms enlist

<sup>1</sup> See *Venicoff, Ex parte*, [1920] 3 K.B. 72: the Home Secretary's action in making an order is executive, and he need not hold an inquiry; *Bressler, Ex parte* (1924), 88 J.P. 89: the wife of an alien deported for failure to register cannot claim *habeas corpus*; *Sugarman, Ex parte* (1922), 127 L.T. 27; *R. v. Kakelo*, [1923] 2 K.B. 793.

<sup>2</sup> Including, e.g., information to be given to hotels: Aliens Order, 1920, s. 7; *Williams v. Jones*, [1928] 2 K.B. 227.

<sup>3</sup> Re-enacted in the British Nationality and Status of Aliens Act, 1914, s. 17. The power to lease, but only up to twenty-one years, was given by an Act of 1844.

<sup>4</sup> *R. v. Arnaud* (1846), 16 L.J. Q.B. 50.

in the armed forces of the Crown but may not attain commissioned rank.<sup>1</sup> All aliens not part of invading forces owe allegiance, local<sup>2</sup> as opposed to natural, to the sovereign; even if they are nationals of the invading sovereign, they are guilty of treason if they assist the invaders.

In war time aliens subjects of the Power at war with the Crown are enemy aliens. They may be treated as prisoners of war, and their property might be confiscated, in all likelihood without actual illegality, but this would be most improper.<sup>3</sup> Their right to sue during war is suspended save with royal licence,<sup>4</sup> but they can be sued, and can appeal in such cases.<sup>5</sup> By a declaration of war by the Crown commercial and financial relations and intercourse with all persons voluntarily residing or carrying on business in an enemy country, whatever their nationality, becomes illegal save under royal licence,<sup>6</sup> and all contracts made with such persons are at least suspended in operation and are dissolved outright if their execution would involve intercourse with the enemy during war in any way; otherwise they revive and may be enforced,<sup>7</sup> provided of course no other arrangement is made, as was the case in 1919–20 when treaties of peace concluded the war of 1914–18.<sup>8</sup> During that war an extended meaning<sup>9</sup> was given to its concept ‘alien enemy’ for trading purposes, so that it covered enemy nationals and certain persons with hostile associations, though not resident on enemy territory.

<sup>1</sup> Army Act, s. 95; Air Force Act, s. 95.

<sup>2</sup> *De Jager v. Att. Gen. of Natal*, [1907] A.C. 326. Cf. *R. v. Ahlers*, [1915]

1 K.B. 616.

<sup>3</sup> *Ferdinand, Ex-Tsar of Bulgaria, In re*, [1921] 1 Ch. 107.

<sup>4</sup> *Porter v. Freudenburg*, [1915] 1 K.B. 857.

<sup>5</sup> Ibid.

<sup>6</sup> *Bousmaker, Ex parte* (1806), 13 Ves. 71.

<sup>7</sup> *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260.

<sup>8</sup> These treaties provided for the liquidation of enemy property rights, and included a Mixed Arbitral Tribunal procedure to settle claims; see *Administrator of German Property v. Knoop*, [1933] Ch. 439.

<sup>9</sup> 5 & 6 Geo. V, c. 98.

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